TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, ET AL., APPELLANTS,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

FILED NOVEMBER 18, 1939.

SUPREME COURT OF THE UNITED STATES

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IN SURROGATE'S COURT, COUNTY OF NEW YORK

Notice of Appeal P-1177—1934

In the Matter of the Appraisal under the Estate Tax Law of the Estate of ALICE G. VANDERBILT, Deceased

NOTICE OF APPEAL TO APPELLATE DIVISION OF EXECUTORS AND OF CORNELIUS VANDERBILT, INDIVIDUALLY, AND OF GLADYS SZECHENYI

SIRS:

Please take notice that Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, and Gladys Szechenyi, hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department, from the order of the Surrogate's Court of the County of New York made and entered herein on the 28th day of September, 1937, modifying the pro forma order of said Surrogate's Court made and en- [fol. 3] tered herein the 13th day of July, 1936, assessing, fixing and determining the estate tax herein and from each and every part of said order made and entered herein on the 28th day of September, 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of said Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gerturde Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt.

Dated, New York, N. Y., October 27, 1937.

Yours, etc., Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Office and P. O. Address, 20 Pine Street, Borough of Manhattan, City of New York. Root, Clark, Buckner & Ballantine, Attorneys for Gladys Szechenyi, Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

To: Charles P. Sheridan, Esq., Clerk of the Surrogate's [fol. 4] Court, New York County. Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y. Le Boeuf, Winston, Machold & Lamb, Esqs., Attorneys for Cathleen Vanderbilt Lowman, 15 Broad Street, New York, N. Y. Cadwalader, Wickersham & Taft, Esqs., Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, 14 Wall Street, New York, N. Y. Thomas B. Gilchrist, Esq., As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, 14 Wall Street, New York, N. Y.

In Surrogate's Court, New York County

Notice of Appeal to Appellate Division of Gloria Laura Morgan Vanderbilt, Infant, and of Thomas B. Gilchrist as General Guardian of Her Property

Sirs:

Please take notice that Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of her property, and Thomas B. Gilchrist, as General Guardian of the property of said infant, hereby appeal to the Appellate [fol. 5] Division of the Supreme Court, for the First Judicial Department, from the order of the Surrogates' Court of the County of New York made and entered herein on the 28th day of September, 1937, modifying the pro forma order of said Surrogates' Court made and entered herein on the 13th day of July, 1936, assessing, fixing and determining the estate tax herein, and from each and every part of said order made and entered herein on the 28th day of September, 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt.

Dated: New York, N. Y., October 27, 1937.

Yours, etc., Thomas B. Gilchrist, As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, City of New York. Cadwalader, Wickersham & Taft, Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, City of New York.

[fol. 6] To: Charles P. Sheridan, Esq., Clerk of the Surrogates' Court of the County of New York, Hall of Records, New York, N. Y. Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y. Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Gertrude Vanderbilt Whitney and said Cornelius Vanderbilt, individually, 20 Pine Street, New York, N. Y. Root, Clark, Buckner & Ballantine, Esqs., Attorneys for Gladys Szechenyi, 31 Nassau Street, New York, N. Y. Le Boeuf, Winston, Machold & Lamb, Esqs., Attorneys for Cathleen Vanderbilt Lowman, 15 Broad Street, New York, N. Y.

IN SURROGATE'S COURT, NEW YORK COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION OF CATHLEEN VANDERBILT LOWMAN

SIRS:

Please take notice that Cathleen Vanderbilt Lowman hereby appeals to the Appellate Division of the Supreme [fol. 7] Court, for the First Judicial Department, from the order of the Surrogate's Court of the County of New York made and entered herein on the 28th day of September, 1937, modifying the pro forma order of said Surrogate's Court made and entered herein on the 13th day of July, 1936, assessing, fixing and determining the estate tax herein, and from each and every part of said order made

and entered herein on the 28th day of September, 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt.

Dated: New York, N. Y., October 27, 1937.

Yours, etc., Le Boeuf, Winston, Machold & Lamb, Attorneys for Cathleen Vanderbilt Lowman, Office and Post Office Address: 15 Broad Street, Borough of Manhattan, City of New York.

To: Charles P. Sheridan, Esq., Clerk of the Surrogates' Court of the County of New York, Hall of Records, New York, N. Y. Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y. [fol. 8] Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, 20 Pine Street, New York, N. Y. Root, Clark, Buckner & Ballantine, Esqs., Attorneys for Gladys Szechenyi, 31 Nassau Street, New York, N. Y. Cadwalader, Wickersham & Taft, Esqs., Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant; 14 Wall Street, New York, N. Y.

IN SURROGATE'S COURT, COUNTY OF NEW YORK

NOTICE OF APPEAL TO APPELLATE DIVISION OF STATE TAX COMMISSION

SIRS:

Please take notice that the State Tax Commission of the State of New York hereby appeals to the Appellate Division of the Supreme Court of the State of New York for the First Department from the order entered in the above entitled proceeding in the office of the Clerk of the Surro- [fol. 9] gate's Court of the County of New York on the

28th day of September 1937, and from each and every part of said order.

Dated: New York, N. Y., Nov. 8, 1937.

Edgar Hirschberg, Attorney for State Tax Commission, Office and Post Office Address, 80 Centre Street, New York, N. Y.

To: Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Executors, 20 Pine Street, New York City. Root, Clark, Buckner & Ballentine, Esqs., Attorneys for Gladys Szechenyi, 31 Nassau Street, New York City. Le Boeuf, Winston, Machold & Lamb, Esqs., Attorneys for Cathleen Vanderbilt Lowman, 15 Broad Street, New York City. Cadwalder, Wickersham & Taft, Esqs., Attorneys for Thomas B. Gilchrist, 14 Wall Street, New York City.

Charles P. Sheridan, Esq., Clerk of Surrogate's Court, County of New York.

[fol. 10] In Surrogate's Court, County of New York

Order Appealed From—September 28, 1937

Present: Hon. James A. Foley, Surrogate.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, Gladys Szechenyi, daughter of the said decedent, Cathleen Vanderbilt Lowman, daughter of Reginald C. Vanderbilt, deceased son of said decedent, Gloria Laura Morgan Vanderbilt, infant daughter of Reginald C. Vanderbilt, deceased son of said decedent, by Thomas B. Gilchrist as General Guardian of her property, and Thomas B. Gilchrist as General Guardian of the property of said infant, having appealed to this Court from the appraisal of the property of the said decedent as made in the report of Jacob Manicoff the appraiser herein, which report was filed herein on the 25th day of May, 1936, and from the order of the Surrogate assessing, fixing and determining the estate tax upon the property of the said decedent made and entered herein on the 13th day of July, 1936, on the grounds that

(1) the inclusion in the gross estate of the decedent Alice G. Vanderbilt of the property or any part of the property constituting the principal of the trust created by the

[fol. 11] Seventh Clause of the will of Cornelius Vanderbilt, deceased, which property has been appraised herein at $5,935,572.07 and over which property said Alice G. Vanderbilt exercised by the Third Article of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt, was erroneous and illegal;

(2) the inclusion in the gross estate of the decedent Alice G. Vanderbilt of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius Vanderbilt, deceased, as passed to Gertrude Vanderbilt Whitney, to wit, the sum of $150,000, and of so much of said principal as passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, was erroneous and illegal;

and upon other grounds as set forth in the respective notices of appeal herein, all as more fully appears from the respective notices of appeal heretofore filed herein, to which reference is hereby made for a statement of the grounds of the appeal of said parties as if said grounds of appeal were fully set forth and recited herein,

And said appeals having duly come on to be heard before me,

Now, on reading said report of said appraiser, said notices of appeal, the affidavits of Ray C. Gasser, sworn to respectively September 3, 1936 and February 1, 1937, both duly filed herein on the 2nd day of February, 1937, and upon all of the proceedings and papers heretofore had and filed herein, and after hearing Roy C. Gasser, Esq., of Anderson, [fol. 12] Gasser, Ferris & Anderson, of counsel for said Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, Arthur A. Ballantine, Esq., of Root, Clark, Buckner & Ballantine, of counsel for said Gladys Szechenyi, Horace R. Lamb, Esq., of LeBoeuf, Winston, Machold & Lamb, of counsel for said Cathleen Vanderbilt Lowman, Thomas B. Gilchrist, Esq., and Hampton D. Ewing, Jr., Esq., of Cadwalader, Wickersham & Taft, of counsel for Thomas B. Gilchrist as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, all in support of said appeals, and Sol Zaretski, Esq.,

of counsel for the State Tax Commission, in opposition thereto, and due deliberation being had, and the opinion and decision of the Surrogate having been filed herein on the 7th day of June, 1937, it is

Ordered and adjudged that out of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, the sum of $150,000. which passed to Gertrude Vanderbilt Whitney and the further sum of $500,000 which passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, were erroneously and illegally included in the gross estate of the decedent Alice G. Vanderbilt for the purposes of taxation under the provisions of Article 10-C of the Tax Law, and it is further

Ordered and adjudged that each of the appeals herein be and the same hereby is sustained as to the ground of appeal hereinbefore numbered "(2)", and it is further

Ordered and adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law are [fol. 13] applicable to so much of the trust fund created under the Seventh Clause of the will of said Cornelius Vanderbilt, deceased, as passed to Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt and Gladys Szechenyi, and that said provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law require that the value thereof, to wit, the sum of $5,285,572.07 (being the value of said trust fund as heretofore appraised herein less the sum of $650,000) be included in the gross estate of said Alice G. Vanderbilt, deceased, for the purpose of assessing, fixing and determining the estate tax upon the estate of said deceased imposed by Article 10-C of the Tax Law, and it is further

Ordered and adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, in so far as the provisions thereof are hereby held to be applicable to the trust fund created by the Seventh Article of the will of said Cornelius Vanderbilt, deceased, over which the decedent Alice G. Vanderbilt exercised by Article Third of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Van-

derbilt are valid and constitutional and do not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States or Article 1, Section 6 of the Constitution of the State of New York; and that the inclusion of the value of said trust fund to the extent herein directed in the gross estate of said Alice G. Vanderbilt, deceased, for the purposes of assessing, fixing and determining the estate tax upon the estate of said Alice G. Vanderbilt, deceased, does not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United [fol. 14] States or Article I, Section 6 of the Constitution of the State of New York, and it is further

Ordered and adjudged that, except as hereinbefore provided, each of said appeals be and the same hereby is overruled as to each of the grounds of appeal set forth in the respective notices of appeal heretofore filed herein, and it is further

Ordered and adjudged that the order entered herein on the 13th day of July, 1936, be and the same hereby is modified accordingly, and that the market value of the gross estate of said Alice G. Vanderbilt, deceased, at the time of her death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable shall be and the same hereby is assessed, fixed and determined as follows:

Gross estate	$10,120,907.17
Total deductions allowed by statute	766,319.32
Net estate	$9,354,587.85
Tax on net estate not in excess of $150,000 less $36,200 exemptions allowed under Section 249-q	$1,138.00
Tax on net estate in excess of $150,000	1,211,371.69
Total tax	$1,212,509.69

J. A. F., Surrogate.

[fol. 15] IN SURROGATE'S COURT, COUNTY OF NEW YORK

PETITION FOR APPRAISER

To the Surrogate's Court of the County of New York:

The petition of Cornelius Vanderbilt respectfully shows:

First. That your petitioner is one of the executors under the last Will and Testament of Alice G. Vanderbilt, deceased, and as such is a person interested in the estate of the said deceased.

Second. That the said decedent departed this life on the 22nd day of April, 1934, at 1 East 67th Street, New York City, New York; that the said deceased was a resident of the County of New York.

Third. That letters testamentary on the estate of said deceased were, on the 29th day of May, 1934, issued to your petitioner and Gertrude Vanderbilt Whitney by the Surrogate's Court of the County of New York, and that their post-office addresses are: Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York City, New York; Cornelius Vanderbilt, 640 Fifth Avenue, New York City, New York.

Fourth. That, as your petitioner is informed and believes, the estate of said decedent, is or may be subject to the payment of the tax imposed by law on the estates of deceased persons.

[fol. 16] Fifth: That all persons who are interested in said estate and who are entitled to notice of all proceedings herein, and their post-office addresses are as follows:

The State Tax Commission, Albany, N. Y.
Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York City, N. Y.
Countess Gladys Szechenyi, 35 Eton Place, London, England.
Cornelius Vanderbilt, 640 Fifth Avenue, New York City, N. Y.
Flora Whitney Miller, Old Westbury, Nassau County, N. Y.
Pamela Tower, Old Westbury, Nassau County, N. Y.
Whitney Tower, Old Westbury, Nassau County, N. Y.

Flora MacCulloch Miller, Old Westbury, Nassau County, N. Y.
Leverett Miller, Old Westbury, Nassau County, N. Y.
Cornelius Vanderbilt Whitney, Old Westbury, Nassau Caunty, N. Y.
Harry Payne Whitney, 2nd, Old Westbury, Nassau County, N. Y.
Marie Nancy Whitney, Old Westbury, Nassau County, N. Y.
Barbara Whitney Henry, Old Westbury, Nassau County, N. Y.
Gertrude Whitney Henry, Old Westbury, Nassau County, N. Y.
William Barklie Henry, Old Westbury, Nassau County, N. Y.
Cornelius Vanderbilt, Jr., Reno, Nevada.
Grace Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y.
Cornelia Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y.
Cornelia S. Roberts, 1901 23rd Street, Washington, D. C.
Gladys Roberts, 1901 23rd Street, Washington, D. C.
Countess Alice Hadik, Seregelyes, Fejer M, Hungary.
Laszlo Hadik, Seregelyes, Fejer M, Hungary.
Bela Hadik, Seregelyes, Fejer M, Hungary.
Gladys Szechenyi, 35 Eton Place, London, England.
[fol. 17] Sylvia Szechenyi, 35 Eton Place, London, England.
Nandine Szechenyi, 35 Eton Place, London, England.
William H. Vanderbilt, Oakland Farm, Portsmouth, R. I.
Emily Vanderbilt, Oakland Farm, Portsmouth, R. I.
Ellen French Vanderbilt, Oakland Farm, Portsmouth, R. I.
Anne Colby Vanderbilt, Oakland Farm, Portsmouth, R. I.
Alfred G. Vanderbilt, Banyan Road, Palm Beach, Florida.
George Vanderbilt, Banyan Road, Palm Beach, Florida.
Cathleen Vanderbilt Lowman, Longridge and Riverbank Roads, Stamford, Conn.

Harry Cook Cushing, 4th, 125 East 63rd Street, New York City, N. Y.
Gloria Laura Morgan Vanderbilt, Old Westbury, Nassau County, N. Y.
Count Laszlo Szechenyi, 35 Eton Place, London, England.
Alice Vanderbilt Morris, 415 Lexington Avenue, New York City, N. Y.
Gloria Morgan Vanderbilt, 49 East 72nd Street, New York City, N. Y.
William E. Shepherd, 21 East 82nd Street, New York City, N. Y.
Maude Gwynne Harrah, Mt. Kisco, Westchester County, N. Y.
Society of St. Johnland, Kings Park, Long Island, N. Y.
Newport Hospital, Newport, Rhode Island.
St. Bartholomew's Church, 109 East 56th Street, New York City, N. Y.
William Annett, 53 East 79th Street, New York City, N. Y.
Thomas Clancy, 24 East 72nd Street, New York City, N. Y.
Alma Petersen, 993 Fifth Avenue, New York City, N. Y.
Elsa Anderson, 993 Fifth Avenue, New York City, N. Y.
William Crane, as Executor under the will of Mary Crane, deceased, 796 Fairmount Place, Bronx, New York.
Teresa Turner, 304 Broadway, Newport, Rhode Island.
[fol. 18] Margaret MacNamara, 6111 64th Street, Maspeth, L. I.
Sheila Sheehan (formerly known as Sheila Sweeney), West End, Rathmore, County Kerry, Ireland.
John Fenton, 20 East 65th Street, New York City, N. Y.
John Cunningham, 1 East 67th Street, New York City, N. Y.
Augustus Tebbit, The Breakers, Newport, Rhode Island.
Cornelius Riley, The Breakers, Newport, Rhode Island.

John Harrington, The Breakers, Newport, Rhode Island.

William Murphy, Coggeshall Avenue, Newport, Rhode Island.

Joseph Sylvester, 5 Potter Street, Newport, Rhode Island.

William Neilson, 5 Conrad Court, Newport, Rhode Island.

John Brady, 22 Newport Avenue, Newport, Rhode Island.

Charles Knittel, 2726 Valentine Avenue, New York City, N. Y.

John Gallagher, 341 East 85th Street, New York City, N. Y.

John Mitchell, 1 East 67th Street, New York City, N. Y.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Trustees of the trust created by the Fourteenth Clause of the Will, 230 Park Avenue, New York City, N. Y.

United States Trust Company of New York, 45 Wall Street, New York City, N. Y.

George W. Wickersham, Esq., and Thomas B. Gilchrist, Esq., as General Guardians of the Estate of Gloria Laura Morgan Vanderbilt, infant, 14 Wall Street, New York City, N. Y.

Guaranty Trust Company of New York, 5th Avenue & 44th Street, New York City, N. Y.

That all the above-named are of full age and sound mind, except: Cornelia Vanderbilt Davis, Pamela Tower, Whitney Tower, Flora MacCulloch Miller, Leverett Miller, Harry [fol. 19] Payne Whitney, 2nd, Marie Nancy Whitney, Gertrude Whitney Henry, William Barklie Henry, Gladys Roberts, Laszlo Hadik, Bela Hadik, Gladys Szechenyi, Sylvia Szechenyi, Nandine Szechenyi, Emily Vanderbilt, Ellen French Vanderbilt, Anne Colby Vanderbilt, George Vanderbilt, Harry Cook Cushing, 4th, and Gloria Laura Morgan Vanderbilt.

That the gross value of the estate of the decedent, wherever situated, is more than $10,000.

That no previous application has been made for an order granting the relief prayed for in this petition.

That there are no persons, other than those herein mentioned, interested in this proceeding.

Wherefore, your petitioner prays that you will designate an appraiser, as provided by law, to fix, under Article 10-C, Chapter 60 of the Consolidated Laws of 1909, and the Acts amendatory thereof and supplemental thereto, the fair market value of the property, of the estate of the above-named decedent, subject to the payment of the estate tax, and to do such other thing or things in the premises as he may be authorized to do by virtue of his office under the said provision of law.

Dated, New York, February 18th, 1935.

Cornelius Vanderbilt, Petitioner.

[fol. 20] *Duly sworn to by Cornelius Vanderbilt. Jurat omitted in printing.*

[fol. 21] IN SURROGATE'S COURT, COUNTY OF NEW YORK

[Title omitted]

ORDER DESIGNATING APPRAISER—Feb. 21, 1935

On reading and filing the petitions filed in the above-named estates, I do hereby, pursuant to the requirement of the Tax Law, direct Jacob Manicoff, Esq., one of the appraisers appointed by the State Tax Commission under said statute, to fix the fair market value of the property which was of the above-named decedents, to declare the value of such interest or interests therein as may be subject to the payment of the transfer or estate tax, to declare exempt from such tax such interest or interests as he may find to be exempt, and to do such other thing or things in the premises as he may be authorized to do, by virtue of his office under the said provision of law.

J. A. F., Surrogate.

[fol. 22] IN SURROGATE'S COURT, COUNTY OF NEW YORK

[Title omitted]

REPORT OF APPRAISER

To the Surrogate's Court of the County of New York:

I, Jacob Manicoff, Estate Tax Appraiser, having been designated by Hon. James A. Foley, Surrogate of the County

of New York, by an order duly made and entered on the 21st day of February, 1935, to appraise the estate of the above-named decedent, pursuant to the provisions of the Law imposing a tax on estates of residents and non-residents, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 249-v of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 11th day of May, 1936, at the Office of the Estate Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same, and having given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First.—I report that the decedent herein died a resident of the State of New York on the 22nd day of April, 1934, [fol. 23] leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the —— day of ——, 19—, and that thereafter on the 29th day of May, 1934, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York, N. Y. and Cornelius Vanderbilt, 640 Fifth Avenue, New York, N. Y. as Executors.

Second.—I further report the following appearances in this proceeding:

Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y.

Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Executors, 20 Pine Street, New York, N. Y.

Third.—I further report that I found the property comprising the gross estate of the decedent herein to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me opposite such item in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for the purpose of de-

termining the net estate are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of which I find the said gross estate and deductions to be as shown in the following summary:

[fol. 24] Assets:

Schedule A—Real Estate	$660,000.00
Schedule B—Stocks and Bonds	2,013,495.64
Schedule C—Mortgages, Notes, Cash and Insurance	1,247,252.31
Schedule D-1—Jointly Owned Property	0.00
Schedule D-2—Other Miscellaneous Property	820,284.02
Schedule E—Transfers	94,303.13
Schedule F—Powers of Appointment	5,935,572.07
Schedule G-1—Property Identified as Previously Taxed	0.00
Gross Estate	$10,770,907.17

Subject to Deductions as follows:

Schedule G-2—Property Identified as Previously Taxed	$0.00	
Schedule H—Funeral and Administration Expenses	76,340.28	
Schedule I—Debts	107,090.15	
Schedule J—Mortgages, Net Losses, and Support of Dependents	402,888.89	
Schedule K—Charitable, Public, and Similar Gifts and Bequests	180,000.00	
Total Deductions		$766,319.32
The net estate, I appraise at		$10,004,587.85

Fourth.—I further report that the decedent died a nonresident of this State and that the total valuation of real property situated and tangible personal property having an actual situs within this State is $—.

(This paragraph applies only if the decedent was in fact a nonresident as shown in paragraph 1.)

[fol. 25] Fifth—I further report the amount of exemptions allowed under § 249-q to be:

Beneficiaries	Relationship	Amount of exemption
Cornelius Vanderbilt Whitney	Grandson	$150.00
Alfred G. Vanderbilt	Grandson	5,000.00
Cornelia S. Roberts	Granddaughter	200.00
Countess Alice Hadik	Granddaughter	5,000.00
Gladys Szechenyi (Infant)	Granddaughter	200.00
Sylvia Szechenyi (Infant)	Granddaughter	200.00
Nandine Szechenyi (Infant)	Granddaughter	200.00
Cathleen Vanderbilt Lowman	Granddaughter	5,000.00
Gloria Laura Morgan Vanderbilt (Infant)	Granddaughter	5,000.00
Gertrude Vanderbilt Whitney	Daughter	5,000.00
William H. Vanderbilt	Grandson	5,000.00
George Vanderbilt	Grandson	5,000.00
Countess Gladys Szechenyi	Daughter	5,000.00
Count Laszlo Szechenyi	Son-in-law	5,000.00
Gloria Morgan Vanderbilt	Daughter-in-law	5,000.00
Cornelius Vanderbilt	Son	5,000.00
Insurance		0
Total exemptions		$55,950.00

Respectfully submitted,

Jacob Manicoff, Appraiser.

Dated: New York, N. Y., May 25, 1936.

[fol. 26] In Surrogate's Court, County of New York

Excerpts From Return and Schedules Filed by Executors

State of New York,
County of New York ss:

Cornelius Vanderbilt, executor of the estate of the above-named decedent being duly sworn in this proceeding for the determination of the tax, if any, to be paid upon the assets of the said estate under Article 10-C of the Tax Law, deposes and says that as such executor deponent is personally familiar with affairs of the said estate, the property constituting the assets thereof, their fair market value, and the debts, expenses and charges properly allowable as deductions therefrom, and makes the following return:

General Information:

1. Date of death April 22, 1934.

2. Resident of New York County.

3. Did the decedent leave a will? (Answer "Yes" or "No") Yes.

If the answer is "yes" attach copy of last will.

4. Letters testamentary, were issued on May 29, 1934 by the Surrogate's Court of New York County.

5. The names and post office addresses of the executors are:

Name	Post Office Address
Gertrude Vanderbilt Whitney	871 Fifth Avenue, New York City, N. Y.
Cornelius Vanderbilt	640 Fifth Avenue, New York City, N. Y.

[fol. 27] Gross Estate

Schedule A—Real Estate:

6. Did the decedent at the time of death own any interest in real estate located within the State of New York? (Answer "yes" or "no") Yes.

If the answer is "yes" attach schedule of all interest in real estate, marked Schedule A, following the instructions for that schedule.

Schedule B—Stocks and Bonds:

7. Did the decedent at the time of death own any stocks and bonds? (Answer "yes" or "no") Yes.

If the answer is "yes" enter in schedule marked "B," a complete list of all the corporate stocks and bonds, including interest and dividends thereon, at the date of the decedent's death, together with the fair market value thereof, following the instructions for that schedule.

Schedule C—Mortgages, Notes, Cash and Insurance:

8. Did the decedent at the time of death own any mortgages, notes or cash? (Answer "yes" or "no") Yes.

9. Was any insurance on life of decedent receivable by his estate? (Answer "yes" or "no") No.

10. Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "yes" or "no") No.

If an answer is "yes" submit Schedule C, following instructions for that schedule.

Schedule D-1—Jointly Owned Property:

11. Did the decedent at the time of death own jointly with any person or persons real estate located in New York State [fol. 28] or personal property wheresoever located other than tangible personal property having an actual situs outside of New York State. (Answer "yes" or "no") No.

If the answer is "yes" enter in Schedule marked "D-1" a complete list of all jointly-owned property, following the instructions for that Schedule.

Schedule D-2—Other Miscellaneous Property:

12. Did the decedent at the time of death own any interest in a co-partnership or unincorporated business? (Answer "yes" or "no") No.

13. Did the decedent, at the time of death, own any miscellaneous property not returnable under any other schedule? (Answer "yes" or "no") Yes.

If an answer is "yes," attach a detailed statement of such other property marked "D-2," following the instructions for that schedule.

Schedule E—Transfers:

14. Did the decedent, at any time during life, make any transfer in contemplation of or intended to take effect in possession or enjoyment at or after death, other than by bona fide sale for an adequate and full consideration in money or money's worth? (Answer "yes" or "no") No.

15. Did the decedent, within two years immediately preceding death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "yes" or "no") No.

16. Did the decedent, at any time, make a transfer of a material part of his property without an adequate and full consideration in money or money's worth, but not believed to have been in contemplation of death or intended to take effect in possession or enjoyment at or after his death? (Answer "yes" or "no") No.

[fol. 29] 17. Did the decedent, at the time of death, possess the right (either alone or in conjunction with any person)

to change through the exercise of a power to alter, amend, or revoke the transfer of any property previously made by him? (Answer "yes" or "no") Yes.

18. Did the decedent, at any time during his life, relinquish in contemplation of death the power to alter, amend, or revoke any transfer previously made by him? (Answer "yes" or "no") No.

19. Were there in existence at the time of the decedent's death any trusts created by him during lifetime? (Answer "yes" or "no") Yes.

If any question is answered "yes," submit Schedule E, itemizing all such transfers in detail following the instructions for that schedule.

Schedule F—Powers of Appointment:

20. Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general or limited power of appointment? (Answer "yes" or "no") Yes.

If the answer is "yes," submit Schedule F, following the instructions for that schedule.

Schedule G-1—Property Identified as Previously Taxed:

21. Did the decedent at the date of death own any property (a) forming a part of the gross estate situated in the United States, of any person who died within five years of the date of death of the decedent, or (b) transferred to the decedent by gift within five years prior to his death where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise or inheritance or which [fol 30] can be identified as having been acquired in exchange for property so received? (Answer "yes" or "no") No.

If the answer is "yes," attach Schedule G-1, following the instructions for that schedule.

Deductions

Schedule G-2—Property Identified as Previously Taxed:

22. If property was listed in Schedule G-1, deduction should be taken in Schedule G-2 following the instructions for that schedule.

Schedule H—Funeral and Administration Expenses:

23. Itemize the funeral expenses and administration expenses in Schedule H following the instructions for that schedule.

Schedule I—Debts of Decedent:

24. Itemize the debts of the decedent in Schedule I, following the instructions for that schedule.

Schedule J—Mortgages, Net Losses, and Support of Dependents:

25. Itemize in Schedule J, any mortgages outstanding on property listed in Schedule A, losses through fire, storm, shipwreck or other casualty, or from theft sustained during administration, and expenses incurred in the support of dependents of the decedent, following the instructions for that schedule.

Schedule K—Charitable, Public, and Similar Gifts and Bequests:

26. Itemize in Schedule K, all devises and bequests to exempt corporations, following the instructions for that schedule.

[fol. 31] Schedule L—Beneficiaries:

27. Give in Schedule L, a statement of the names of all persons beneficially interested in the estate, the nature of their respective interests, etc., following the instructions for that schedule.

General Affidavit:

28. Deponent states that he has made diligent search for property of every kind left by the decedent; that he has carefully read the instructions printed on this form; that hereon is listed all the property, tangible and intangible, forming the gross estate of the decedent, so far as it has come to his knowledge and information; that he has carefully read all instructions under Schedule E of this form, and has made diligent and careful search for information as to whether the decedent during his life time made any transfers without a fair consideration in money or money's worth, and the answers given to the questions therein contained are true and

complete to the best of his knowledge, information and belief; that to the best of his knowledge, information and belief, the value shown for each item of property listed in this return was the fair market value of the same at the day of decedent's death, and that the debts, expenses and charges entered herein as deductions from the gross estate are correct and legally allowable.

Cornelius Vanderbilt.

Sworn to before me this 18th day of February, 1935.
Miriam C. West, Notary Public Kings County.
(Seal.)

[fol. 32] Schedule F—Powers of Appointment

Item No.		Description	Amount	Values as appraised in this proceeding
		Principal of fund held in trust by United States Trust Company of New York under Clauses Seventh and Eighth of the Will of Cornelius Vanderbilt, Deceased. Cornelius Vanderbilt, husband of the decedent, died testate September 12, 1899. His will, a copy of which is submitted herewith was admitted to probate by the Surrogate's Court of the County of New York on November 9, 1899. As appears by reference to said will, by the Seventh Clause thereof Mr. Vanderbilt bequeathed to the decedent, "the annual income or sum of Two hundred and fifty thousand dollars, . . . arising from securities to be selected" from his estate by his executors and to be set apart and held in trust by them during decedent's life; and by the Eighth Clause of his will at the death of the decedent he gave the principal of the fund to set apart to certain of their issue in such proportions and amounts as the decedent should direct or appoint in her last will and testament. By order of the Surrogate's Court of the County of New York made and entered on the 8th day of February, 1934, United States Trust Company of New York (whose office is at No. 45 Wall Street in the Borough of Manhattan in the City of New York) was appointed successor trustee of said fund. By the Third Article of her will, in the exercise of said power, the decedent appointed the principal of said fund to and among issue of said Cornelius Vanderbilt and the decedent designated by Clause Eighth of said will of said Cornelius Vanderbilt, as follows: $150,000 thereof to her daughter Gertrude Vanderbilt Whitney; $500,000 thereof in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of her son Alfred G. Vanderbilt; one third of the balance thereof in equal shares to Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt, daughters of her son Reginald C. Vanderbilt; and the remaining two-thirds of said balance to her daughter Countess Gladys Szechenyi. At the decedent's death the principal of said fund consisted of:		
1.	(1)	Cash	$1,260.20	
		Bonds		
	(2)	$195,000 par value Beach Creek Railroad Company, First Mortgage 4% Bonds, due July 1, 1936, interest payable January 1 and July 1, at 100, New York Stock Exchange	195,000.00	
[fol. 33]				
	(3)	$25,000 par value The Delaware & Hudson Company, First and Refunding Mortgage 4% Bonds, due May 1, 1943, interest payable May 1 and November 1, at 94-3/4, New York Stock Exchange	$23,687.50	

Schedule F—Powers of Appointment (Continued)

Item No.		Description	Amount	Values as appraised in this proceeding
(4)	101,000	par value Indiana Harbor Belt Railroad Company, General Mortgage 4% Bonds, due July 1, 1957, interest payable January 1 and July 1, at 92, Boston Stock Exchange	92,920.00	
(5)	51,000	par value Kalamazoo, Allegan & Grand Rapids Railroad Company, First Mortgage 5% Bonds, due July 1 1938, interest payable January 1 and July 1, at 103, New York Stock Exchange	52,530.00	
(6)	580,000	par value Morris & Essex Railroad Company, First Refunding Mortgage 3-1/2% Bonds, due December 1, 2000, interest payable June 1 and December 1, at 88-3/4, New York Stock Exchange	514,750.00	
(7)	58,000	par value The Michigan Central Railroad Company, Kalamazoo & South Haven Division, First Mortgage 5% Bonds, due November 1, 1939, interest payable May 1 and November 1, at 93	53,940.00	
(8)	36,000	par value New Jersey Junction Railroad Company, First Mortgage 4% Bonds, due February 1, 1986, interest payable February 1 and August 1, at 85-1/8, New York Stock Exchange	30,645.00	
(9)	970,000	par value New York Central & Hudson River Railroad Company, Michigan Central Collateral 3-1/2% Bonds, due February 1, 1998, interest payable February 1 and August 1, at 81-3/4, New York Stock Exchange	792,975.00	
(10)	1,114,000	par value New York Central Railroad Company, Consolidation 4% Bonds, Series "A", due February 1, 1998, interest payable February 1 and August 1, at 89-3/4, New York Stock Exchange	999,815.00	
(11)	1,774,000	par value New York Central & Hudson River Railroad Company, Mortgage 3-1/2% Bonds, due July 1, 1997, interest payable January 1 and July 1, at 86-3/8, New York Stock Exchange.	1,532,292.50	
[fol. 34]				
(12)	$78,000	par value New York Central & Hudson River Railroad Company, Refunding & Improvement 4-1/2% Bonds, Series "A", due October 1, 2013, interest payable April 1 and October 1, at 74-3/8, New York Stock Exchange	$58,012.50	
(13)	500	par value Northern Pacific Railway Company, Prior Lien Railway & Land Grant 4% Bonds due January 1, 1997, interest payable January 1, April 1, July 1 and October 1, at 94-3/4, New York Stock Exchange	473.75	
(14)	28,000	par value State of New York, 3-1/4% Bonds, due October 15, 1962, interest payable April 15 and October 15 at 102-3/8	28,645.00	— $28,665.00

Schedule F—Powers of Appointment (Continued)

Item No.		Description	Amount	Values as appraised in this proceeding
(15)	7,000	par value State of New York, 3-1/4% Bonds, due October 15, 1963, interest payable April 15 and October 15 at 102-3/8	7,166.25	
(16)	95,000	par value State of New York, 3-1/4% Bonds, due October 15, 1964, interest payable April 15 and October 15, at 102-1/2	97,375.00	
(17)	15,000	par value State of New York, 3-1/4% Bonds, due October 15, 1965, interest payable April 15 and October 15, at 102-1/2	15,375.00	
(18)	24,000	par value State of New York, 3-1/2% Bonds, due March 1, 1938, interest payable March 1 and September 1, at 104-3/4	25,140.00	
(19)	220,000	par value State of New York, 4% Bonds, due January 1, 1961, interest payable January 1 and July 1, at 114	250,800.00	
(20)	140,000	par value State of New York, 4% Bonds, due January 1, 1962, interest payable January 1 and July 1 at 114	159,600.00	
(21)	100,000	par value State of New York, 4% Bonds, due January 1, 1967, interest payable January 1 and July 1, at 114	114,000.00	
(22)	94,000	par value Union Pacific Railroad Company, Railroad & Land Grant First Mortgage 4% Bonds, due July 1, 1947, interest payable January 1 and July 1, at 104-1/8 New York Stock Exchange	97,877.50	
[fol. 35]				
(23)	$179,000	par value United States of America, First Liberty Loan, 3-1/2% Gold Bonds, due June 15, 1947, interest payable June 15 and December 15, at 103-22/32	$185,600.62	
(24)	195,000	par value West Shore Railroad Company, First Mortgage 4% bonds, due January 1, 2361, interest payable January 1 and July 1, at 82-5/8, New York Stock Exchange	161,118.75	
		Corporate Stock		
(25)	4/792	shares Beach Creek Railroad Company, Capital Stock, par value $50 per share, at 33-1/2, New York Stock Exchange	160,532.00	
(26)	2,724	shares The Pittsburgh & Lake Erie Railroad Company, Capital Stock, par value $50 per share, at 75-1/2, New York Curb Exchange	205,662.00	
(27)	3,632	shares Pullman, Inc., Capital Stock, no par value, at 58-5/8, New York Stock Exchange	212,926.00	
		Total	$6,070,119.57	$6,070,139.57

Said principal however being subject to trustee's commissions and the cost and expenses of the trustee's accounting, a detailed statement of which will be submitted hereafter.

Less atty's fees etc. as per supp. affd. 76,712.80

*$5,993,426.77

* An additional $57,854.70 was allowed for commissions for receiving principal and the appraiser's report as filed lists the total of the schedule at $5,935,572.07.

[fol. 36]

Schedule L

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
1. Cornelius Vanderbilt, 640 Fifth Avenue, New York City, N. Y. Age 61	Son	Income of residuary estate for life	Unknown
2. Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York City, N. Y.	Daughter	Contingent remainder interest in residuary estate	Unknown
3. Countess Gladys Szechenyi, 35 Eton Place, London, England.	Daughter	(a) Real Estate 1 East 67th Street, Borough of Manhattan, City and State of New York	$250,000
		(b) Contingent remainder interest in residuary estate	Unknown
4. Cornelius Vanderbilt, Jr., Reno, Nevada.	Grandson	Remainder interest in one-half residuary estate	Unknown
5. Grace Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y.	Granddaughter	Remainder interest in one-half residuary estate	Unknown
6. Cornelia Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y. Age 5.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
7. Flora Whitney Miller, Old Westbury, Long Island, N. Y.	Granddaughter	Contingent remainder interest in residuary estate	Unknown
8. Pamela Tower, Old Westbury, Long Island, N. Y. Age 12.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
9. Whitney Tower, Old Westbury, Long Island, N. Y. Age 10.	Great-Grandson	Contingent remainder interest in residuary estate	Unknown
10. Flora MacCulloch Miller, Old Westbury, Long Island, N. Y. Age 5.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
11. Leverett Miller, Old Westbury, Long Island, N. Y. Age 2.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
12. Cornelius Vanderbilt Whitney, Old Westbury, Long Island, N. Y.	Grandson	(a) Specific bequest of portrait	$150.00
		(b) Contingent remainder interest in residuary estate	Unknown
[fol. 37]			
13. Harry Payne Whitney, 2d, Old Westbury, Long Island, N. Y Age 10.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
14. Marie Nancy Whitney, Old Westbury, Long Island, N. Y. Age 7.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown

Schedule L—Continued

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
15. Barbara Whitney Henry, Old Westbury, Long Island, N. Y.	Granddaughter	Contingent remainder interest in residuary estate	Unknown
16. Gertrude Whitney Henry, Old Westbury, Long Island, N. Y. Age 9.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
17. William Barklie Henry, Old Westbury, Long Island, N. Y. Age 6.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
18. Cornelia S. Roberts, 1901-23rd Street, Washington, D. C.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Contingent remainder interest in residuary estate	Unknown
19. Gladys Roberts, 1901-23rd Street, Washington, D. C Born after death of decedent.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
20. Countess Alice Hadik (named in will as Countess Alice Szechenyi), Seregelyes, Fejer, M. Hungary.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Legacy	50,000.00
		(c) Contingent remainder interest in residuary estate	Unknown
21. Laszlo Hadik Seregelyes, Fejer M. Hungary. Age 2.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
22. Bela Hadik Seregelyes, Fejer M, Hungary Age 1.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
23. Gladys Szechenyi, 35 Eton Place, London, England. Age 20.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
[fol. 38]		(b) Contingent remainder interest in residuary estate	Unknown
24. Sylvia Szechenyi, 35 Eton Place, London, England. Age 15.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Contingent remainder interest in residuary estate	Unknown
25. Nandine Szechenyi, 35 Eton Place, London, England. Age 11.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Contingent remainder interest in residuary estate	Unknown
26. William H. Vanderbilt, Oakland Farm, Portsmouth, R. I.	Grandson	Contingent remainder interest in residuary estate	Unknown
27. Emily Vanderbilt Oakland Farm, Portsmouth. R. I. Age 8.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown

Schedule L—Continued

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
28. Ellen French Vanderbilt, Oakland Farm, Portsmouth, R. I. Age 3.	Great Grand-daughter	Contingent remainder interest in residuary estate.....	Unknown
29. Anne Colby Vanderbilt, Oakland Farm, Portsmouth, R. I. Age 3.	Great Grand-daughter	Contingent remainder interest in residuary estate.....	Unknown
30. Alfred G. Vanderbilt, Banyan Road, Palm Beach, Florida.	Grandson	(a) Specific bequest of portrait..	$250.00
		(b) Contingent remainder interest in residuary estate.....	Unknown
31. George Vanderbilt, Banyan Road, Palm Beach, Florida. Age 19.	Grandson	Contingent remainder interest in residuary estate.....	Unknown
32. Cathleen Vanderbilt Lowman, Longridge and Riverbank Roads, Stamford, Conn.	Grand-daughter	(a) Undivided interest in specific bequest of portrait of her father.....	$125.00
		(b) Contingent remainder interest in residuary estate.....	Unknown
33. Harry Cooke Cushing, 4th, 125 East 63rd Street, New York City, N. Y. Age 11.	Great Grandson	Contingent remainder interest in residuary estate.....	Unknown
34. Gloria Laura Morgan Vanderbilt, Old Westbury, Nassau County, N. Y. Age 10.	Grand-daughter	(a) Undivided interest in specific bequest of portrait of her father.....	$125.00
		(b) Contingent remainder interest in residuary estate.....	Unknown
[fol. 39]			
35. Count Laszlo Szechenyi, 35 Eton Place, London, England.	Son-in-law	Legacy.....	100,000.00
36. Gloria Morgan Vanderbilt, 49 East 72nd Street, New York City, N. Y.	Daughter-in-law	Legacy.....	$100,000.00
37. William E. Shepherd, 21 East 82nd Street, New York City, N. Y.	Nephew	Legacy.....	50,000.00
38. Maude Gwynne Harrah, Mt. Kisco, Westchester County, New York.	Niece	Legacy.....	100,000.00
(said William E. Shepherd and Maude Gwynne Harrah are children of Cettie G. Shepherd, a sister of decedent who predeceased her.)			
39. Alice Vanderbilt Morris, 415 Lexington Avenue, New York City, N. Y.	No relation	Legacy.....	50,000.00
40. William Annett, 53 East 79th Street, New York City, N. Y.	No relation	Legacy.....	500.00

Schedule L—Continued

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
41. Thomas Clancy, 24 East 72nd Street, New York City, N. Y.	No relation	Legacy	500.00
42. Alma Petersen, 993 Fifth Avenue, New York City, N. Y.	No relation	Legacy	500.00
43. Elsa Anderson 993 Fifth Avenue, New York City, N. Y.	No relation	Legacy	$500.00
44. William Crane, as Executor under the will of Mary Crane, deceased, 796 Fairmount Place, Bronx, New York.	No relation	Legacy	3,000.00
45. Teresa Turner, 304 Broadway, Newport, R. I.	No relation	Legacy	1,000.00
46. Margaret MacNamara, 6111-64th Street, Maspeth, L. I.	No relation	Legacy	1,000.00
[fol. 40]			
47. Sheila Sheehan (formerly known as Sheila Sweeney), West End, Rathmore, County Kerry, Ireland.	No relation	Legacy	1,000.00
48. John Fenton, 20 East 65th Street, New York City, N. Y.	No relation	Legacy	500.00
49. John Cunningham, 1 East 67th Street, New York City, N. Y.	No relation	Legacy	4,000.00
50. Augustus Tebbit, The Breakers, Newport, R. I.	No relation	Legacy	1,000.00
51. Cornelius Riley, The Breakers, Newport, R. I.	No relation	Legacy	500.00
52. John Harrington, The Breakers, Newport, R. I.	No relation	Legacy	$1,000.00
53. William Murphy, Coggeshall Avenue, Newport, R. I.	No relation	Legacy	2,000.00
54. Joseph Sylvester, 5 Potter Street, Newport, R. I.	No relation	Legacy	1,000.00
55. William Neilson, 5 Conrad Court, Newport, R. I.	No relation	Legacy	2,000.00
56. John Brady, 22 Newport Avenue, Newport, R. I.	No relation	Legacy	1,000.00
57. Charles Knittel, 2726 Valentine Avenue, New York City, N. Y.	No relation	Legacy	1,000.00
58. John Gallagher, 341 East 85th Street, New York City, N. Y.	No relation	Legacy	Amount Unknown
59. John Mitchell, 1 East 67th Street, New York City, N. Y.	No relation	Legacy	6,000.00

Schedule L—Continued

Beneficiaries

	Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
60.	Society of St. Johnland, Kings Park, Long Island, New York.	No relation	Legacy	50,000.00
61.	The Newport Hospital, Newport, Rhode Island.	No relation	Legacy	$60,000.00
[fol. 41]				
62.	St. Bartholomew's Church, 109 East 56th Street, New York City, N. Y.	No relation	Legacy	50,000.00
63.	Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Trustees of the trust created by the Fourteenth Clause of the Will, 230 Park Avenue, New York City, N. Y.			
64.	George W. Wickersham and Thomas B. Gilchrist, as General Guardians of the estate of Gloria Laura Morgan Vanderbilt, Infant, 14 Wall Street, New York City, N. Y.			
65.	Harry Payne Whitney legatee named in Tenth Clause of Will, predeceased the decedent.			
66.	Guaranty Trust Company of New York, as assignee of legacy to Gloria Morgan Vanderbilt under the Eleventh Clause of the Will, 5th Avenue at 44th Street, New York City, N. Y.			
67.	United States Trust Company of New York (named as Executor and Trustee upon certain contingencies), 45 Wall Street, New York City, N. Y.			

The following are the names of the appointees of the principal of the trust fund over which the decedent had the power of appointment, as set out in Schedule F hereof, all of whose relationship and whose post-office addresses have been listed above:

Name	Relationship	Amount
Gertrude Vanderbilt Whitney,	Daughter	$150,000.00
William H. Vanderbilt,	Grandson	166,666.67
Alfred G. Vanderbilt,	Grandson	166,666.67
George Vanderbilt,	Grandson	166,666.66
Cathleen Vanderbilt Lowman,	Granddaughter	One-sixth balance of said fund.
Gloria Laura Morgan Vanderbilt,	Granddaughter	One-sixth balance of said fund.
Countess Gladys Szechenyi	Daughter	Two-thirds balance of said fund.

[fol. 42] LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT

I, Alice G. Vanderbilt, of the City of New York, do make, publish and declare this my Last Will and Testament as follows:

First. I give and bequeath the portrait of my husband, the late Cornelius Vanderbilt, painted by Porter in the year 1900, to my grandson Cornelius Vanderbilt Whitney.

I give and bequeath the portrait of my son Alfred G. Vanderbilt by Charles Hall to my grandson Alfred G. Vanderbilt.

I give and bequeath each portrait of any one of my children other than my son Alfred G. to the child or children of the individual of whom it is a portrait.

Second. Exercising the power of appointment conferred upon me by the Fourth Clause of my husband's will, I designate and appoint my daughter the Countess Gladys Szechenyi (referred to in said will as Gladys Moore Vanderbilt), if she survives me, to take and receive, and I give, devise and bequeath to her, the residence and all the land and property at Newport, Rhode Island, owned by my husband at the time of his death and devised by said Fourth Clause of his said will, and also all the furniture, pictures, silver, musical instruments and works of art and all articles useful and ornamental, in or appurtenant to said Newport residence, bequeathed by the Fourth Clause of said will, including also as part of said property all the lands, with the stables and buildings thereon, on Coggeshall Avenue at Newport, owned by my husband at the time of his death, with equipment and furniture thereof, being all the [fol. 43] real and personal property described in said Fourth Clause of my husband's will.

In the event that my daughter the Countess Gladys Szechenyi does not survive me, then I designate and appoint my daughter Gertrude Vanderbilt Whitney to take and receive, and I give, devise and bequeath to her, the real and personal property described in and devised and bequeathed by said Fourth Clause of my husband's will.

Third. Exercising the power of appointment conferred upon me by the Eighth Clause of my husband's will over and in respect to the principal of the fund set apart under the Seventh Clause thereof to create the annual payment of Two hundred and fifty thousand dollars to me during my life, I give, bequeath and appoint the same as follows:

(a) One hundred and fifty thousand dollars ($150,000) thereof to my daughter Gertrude Vanderbilt Whitney, and

(b) Five hundred thousand dollars ($500,000) thereof to the issue of my deceased son Alfred G. Vanderbilt, surviving me, in equal shares per stirpes and not per capita;

I make said appointments as a token of my affection for the appointees, having in mind that each of them is otherwise amply provided for;

(c) One-third (⅓) of the balance of the principal of said fund, after the deduction from said principal of the sums above specified, to the issue of my deceased son Reginald C. Vanderbilt, surviving me, in equal shares per stirpes and not per capita, and

[fol. 44] (d) The remaining two-thirds (⅔) of said balance of the principal of said fund to my daughter Countess Gladys Szechenyi;

If either of my said daughters does not survive me I give, bequeath and appoint the share of said principal appointed to her as aforesaid to her issue, surviving me, in equal shares per stirpes and not per capita.

Fourth. All my right, title and interest in and to all that certain building at the northeast corner of Sixth and Main Streets in the City of Cincinnati, County of Hamilton and State of Ohio, known as the Gwynne Building, and the entire plot or parcel of land constituting the site of said building or used in connection therewith, subject, however to the existing lease thereof to The Proctor & Gamble Company and the option to purchase given to the lessee in and by said lease, together with all my right to receive the rental reserved in and by said lease and the agreed purchase price in the event of the exercise of said option, I give, devise and bequeath to my son General Cornelius Vanderbilt absolutely.

Fifth: I give, devise and bequeath to my daughter the Countess Gladys Szechenyi absolutely all that certain plot or parcel of land at the northeasterly corner of Fifth Avenue and 67th Street in the Borough of Manhattan City, County and State of New York, described in and conveyed by deed of Harry Payne Whitney and wife to me, dated July 9th, 1925 and recorded in the Office of the Register

of the County of New York in Liber 3492 of Conveyances at page 230, together with the dwelling-house thereon erected and known at the date hereof by the street number 1 East 67th Street in said Borough and City, and also all [fol. 45] the furniture, furnishings and equipment of said dwelling-house at the time of my decease except articles otherwise specifically bequeathed by this my will or a codicil thereto.

Sixth. I give and bequeath—

To the Society of St. Johnland, Kings Park, Long Island, New York, for the work of Sunbeam Cottage, the sum of Fifty thousand dollars ($50,000);

To the Newport Hospital, at Newport, Rhode Island, the sum of Eighty thousand dollars ($80,000), the income from which to be applied to the support of the Cornelius Vanderbilt Pavilion; and

To St. Bartholomew's Church in the City of New York the sum of Fifty thousand dollars ($50,000).

Seventh. I give and bequeath to my sister Cettie Gwynne Shepherd, the sum of One hundred thousand dollars ($100,000), and to her daughter Maude Gwynne Harrah the sum of Fifty thousand dollars ($50,000).

Eighth. I give and bequeath to my granddaughter and namesake the Countess Alice Szechenyi the sum of Fifty thousand dollars ($50,000).

Ninth. I give and bequeath to Alice Vanderbilt Morris, wife of D. H. Morris, the sum of Fifty thousand dollars ($50,000).

Tenth. I give and bequeath to each of my sons-in-law, Harry Payne Whitney and Count Laszlo Szechenyi, as a mark of esteem and affection, the sum of One hundred thousand dollars ($100,000).

[fol. 46] Eleventh. I give and bequeath to Gloria Morgan Vanderbilt, widow of my son Reginald C. Vanderbilt, the sum of One hundred thousand dollars ($100,000).

Twelfth. To each servant who at the time of my decease is, and for more than five years has been, in my employ I give and bequeath a sum equivalent to One thousand dollars ($1,000) for each five years of his or her continuous employment by me; to each servant who at the time of my

decease is, and for more than three years but not for more than five years has been continuously, in my employ I give and bequeath the sum of Five hundred dollars ($500).

Thirteenth. I direct that the Executrices and Executors of this my will, hereinafter named, pay out of my estate any and every inheritance, transfer or legacy tax chargable upon or on account of any gift, devise or bequest contained in, or any right of transfer or inheritance arising under, this my will or any codicil thereto under any law of the United States, the State of New York, the State of Ohio or any other State or country, excepting and excluding, however, all property, devised or bequeathed to me by the will of my husband in respect to which I have exercised a power of appointment or of testamentary disposition given to me by said will.

Fourteenth. All the rest, residue and remainder of all the property and estate, real and personal, of whatsoever character and wheresoever situated, of which I die seized or possessed or to which I am in any way entitled at the time of my decease, and any part of my estate that has not been effectually devised or bequeathed, I give, devise and be-
[fol. 47] queath to the Executrices and Executors of this my will, hereinafter named, in trust to hold and invest, and from time to time to reinvest and keep invested, the principal thereof, to collect and receive the income from said principal and, after paying from said income all proper expense of administering said trust and all taxes and other charges properly payable by them therefrom, to pay the balance of said income quarterly in each year to my son, General Cornelius Vanderbilt, if he survives me, during and throughout his life, and at his death to assign, transfer and deliver the principal of said trust to, or for the benefit of, his issue in such shares and in such manner, in trust or otherwise, as he shall by his Will, duly admitted to probate, direct and appoint, or, in default of such appointment, to assign, transfer and deliver said principal to and among his surviving issue in equal shares per stirpes and not per capita or, in default of such issue, to and among my issue then surviving in equal shares per stirpes and not per capita.

If my son Cornelius does not survive me but leaves issue surviving me then I direct that said residuary estate be

divided into as many equal shares as shall be required for the following purposes, and that one such share be held in in trust as aforesaid for, and the net income therefrom be paid quarterly in each year to, each child of my said son that survives me during and throughout his or her life and upon his or her death the principal of said share be assigned, transferred and delivered to and among his or her surviving issue in equal shares per stirpes and not per capita, and further that one such share be divided into as many equal parts as there are surviving me children of a deceased child of my said son, and one such part be held in trust as afore- [fol. 48] said for, and the net income therefrom be paid quarterly in each year to, each such surviving child of a deceased child of my said son during and throughout his or her life and upon his or her death the principal of said trust so held for him or her be assigned, transferred and delivered to and among his or her surviving issue in equal shares per stirpes and not per capita; if any one of said life beneficiaries shall leave no issue him or her surviving then and in that event the share or part of said residuary estate held in trust for him or her as aforesaid shall at his or her death be assigned, transferred and delivered to and among the then surviving issue of my son Cornelius in equal shares per stirpes and not per capita, or in default of any such issue to my issue, then surviving, in equal shares per stirpes and not per capita.

Fifteenth. I nominate and appoint my daughters Gertrude Vanderbilt Whitney and Countess Gladys Szechenyi Executrices, and my son General Cornelius Vanderbilt, my son-in-law Harry Payne Whitney, and Frederick L. Merriam, Executors, of this my Will, and Trustees of each trust created or provided for in and by the Fourteenth Clause hereof, each of the four first named to serve as Executrix or Executor and also as Trustee, however, without commissions or other compensation, and her or his acceptance of said appointment to be deemed a waiver of all such compensation. I direct that no bond shall be required of any of the individuals above nominated to qualify her or him to act as such Executrix or Executor or as such Trustee in the State of New York or elsewhere; nor shall any inventory, list or accounting be required of or from said Executrices and Execu- [fol. 49] tors and they are hereby fully released from such inventory, list and accounting.

Sixteenth. I hereby give to said Executrices and Executors of this my Will, as such and also as Trustees of each trust created or provided for in and by this my Will, or to such one or more of them as shall qualify and be at any time serving as such, full power and authority at their, her or his absolute discretion to sell, at public or private sale, at such times and places, in such manner and upon such terms, as they, she or he in their, her or his discretion shall deem advisable, or in their, her or his discretion to lease, or modify an existing lease of, or otherwise dispose of, in such manner, for such periods and upon such terms as they, she or he shall deem advisable, any and all real estate in the State of New York or in the State of Ohio or elsewhere, and any and all personal property, constituting a part of my estate or the principal or part of the principal of such trust; also to mortgage or pledge said real or personal property or any part thereof but only for the purpose of providing funds for the payment of taxes or for the maintenance or improvement of property constituting part of my estate or the principal or part of the principal of such trust, the mortgagee or pledgee, however, to be under no obligation or liability to see to the application of such funds; and as Executrices and Executors or as Trustees as aforesaid to execute and deliver any and all deeds, leases, bonds, mortgages and other instruments appropriate to the exercise of said powers.

I hereby authorize and empower the Trustees of each trust created or provided for in and by this my Will, the survivors and survivor of them, to retain, or in their, her or [fol. 50] his discretion to sell at public or private sale, at such time or times, on such terms and at such prices as they, she or he shall deem advantageous, any or all of the bonds, stocks or other securities owned by me at the time of my decease that shall become the principal or a part of the principal of said trust, and to invest the proceeds of each such sale and any other part of the principal of said trust in any stocks, bonds or other securities, or in any other properties, including real estate, that they, she or he shall deem it desirable or expedient to purchase or invest in for said trust, whether or not such investment in any instance be of the class or kind commonly regarded as a legal investment for trust funds; and I direct that said Trustees, or any of them, shall not be held accountable for any depreciation that may occur in the value of, or any loss resulting from, any such investment. Said Trustees may, but shall not in

any event be required to, create, maintain or set apart from income any reserve or sinking fund to meet diminishing premiums or to offset depreciation in any investment hereby authorized.

Seventeenth. I hereby further authorize and empower the Trustees of each trust created or provided for in and by this my Will, the survivors and survivor of them, at any time in their, her or his discretion, to convey, assign, transfer and deliver the principal and undistributed income of such trust to the United States Trust Company of New York as substituted Trustee thereof, with all the powers, including all discretionary powers, hereby given to and conferred upon them, or upon her or him, upon such terms as shall be agreed upon between said Trustees or Trustee and said Trust Company, [fol. 51] and upon such transfer of said principal and income to said Trust Company and its acceptance of the trust, the said individual Trustees or Trustee shall be fully released and discharged from all further duty, responsibility and obligation with respect to the money and securities so transferred and the further administration of said trust.

Eighteenth. If both the Executrices and all the Executors hereinabove named shall fail to qualify or if at any time before completion of the administration of my estate it shall happen in any way or from any cause that there is living, able and willing to serve no one of said Executrices or Executors, then and in such event I nominate and appoint the United States Trust Company of New York Executor of this my will; and if all the persons hereinabove named as Trustees of the trust or trusts created or provided for in and by the foregoing Fourteenth Clause hereof shall fail to qualify or shall die or become in any way incompetent to serve, then I nominate and appoint said Trust Company sole Trustee of said trusts or of such of them as shall not have been fully administered and shall be thus without Trustees or a Trustee competent and willing to serve. And I give to said United States Trust Company of New York as such Executor and as such Trustee all powers, including all discretionary powers, which I have hereby given to and conferred upon said Executrices and Executors as such and as Trustees as aforesaid.

Nineteenth. I hereby expressly revoke and annul all other wills and codicils by me at any time heretofore made.

[fol. 52] In Witness Whereof, I have to this my Last Will and Testament subscribed my name and affixed my seal this Eighth day of June in the year One thousand, nine hundred and twenty-eight.

Alice G. Vanderbilt (L. S.)

Subscribed, sealed, published and declared by the said Alice G. Vanderbilt, the Testatrix, as, for and to be her Last Will and Testament, in the presence of us and of each of us, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereunto this 8th day of June, One thousand nine hundred and twenty-eight. Henry B. Anderson, Sands Point, N. Y. Emery L. Ferris, 1 Richbell Road, Scarsdale, N. Y. William C. Whittemore, 11 Virginia Place, Larchmont, N. Y.

LAST WILL AND TESTAMENT OF CORNELIUS VANDERBILT

I, Cornelius Vanderbilt, of the City of New York, do make, publish and declare this my last Will and Testament, as follows:

First. I give and devise to my beloved wife Alice G. Vanderbilt, for and during the term of her natural life, my dwelling house on Fifth Avenue and Fifty-seventh and Fifty-eighth Streets in the City of New York, with the full lots upon which the said house stands, bounded and described and containing as follows to wit:

[fol. 53] Beginning at the northwest corner of Fifty-seventh Street and Fifth Avenue; running thence westerly along Fifty-seventh Street, one hundred and twenty-five feet; thence northerly, at right angles with Fifty-seventh Street, to the centre line of the block; thence westerly, along said centre line ten feet; thence northerly to Fifty-eighth Street; thence easterly along Fifty-eighth Street one hundred and thirty-five feet to Fifth Avenue; thence southerly along Fifth Avenue to the place of beginning. Also I give and devise to her two lots known by the Street numbers Forty-two and Forty-four East Fifty-eighth Street, whereon my stable now stands, for the term of her natural life. Also I give to my wife all the household furniture, pictures,

silver, musical instruments and works of art, and all other articles, useful or ornamental, which may be in or appurtenant to my residence in New York at the time of my decease, with power during her life to change or dispose of any of my household furniture or other chattels.

I except from this bequest the portrait and bust of my grandfather, and the portrait of my father left to me by my father, and the two portraits bequeathed to me in the Will of my grandfather, all of which I give to my son Alfred G.; the portrait of my father and grandfather, which I bequeath to my son Reginald C.; two portraits of myself, which I bequeath, one to each of my daughters Gertrude and Gladys Moore, to be selected for that purpose by my wife, and my several pearl pins which I bequeath to my two daughters Gertrude and Gladys Moore. All the rest of my personal jewelry, with my watches, I give to my wife Alice G. She knows my views in respect thereof, and in her judgment I have entire confidence.

[fol. 54] Second. At the death of my wife, I give, devise and bequeath the said above described property so devised to her for her natural life, to such one of my sons Alfred G. or Reginald C., if they or either of them survive her, as she may nominate or appoint for that purpose in her last Will and Testament, and in default of such appointment, I devise the same to the eldest of my said sons Alfred G. or Reginald C., who shall be living at the time of the death of my wife, to have and to hold the same to such son, his heirs and assigns forever.

If neither of my said two sons shall be living at the death of my wife, I give and devise the said property to the eldest of my daughters then living, her heirs and assigns forever. If neither of my said sons or daughters shall be then living, I direct that the said property so devised to my wife for life shall be sold by my Executors, or the survivors or survivor of them and the proceeds thereof divided among the then living children of my daughter Gertrude, my son Alfred G., my son Reginald C. and my daughter Gladys Moore, and in default of such grandchildren, the said property shall become and be part of my residuary estate.

Third. I also give to my wife my pew in Trinity Church, Newport, Rhode Island, and my pew Number Twenty in St. Bartholomew's Church in the City of New York, to have and to hold the same to her, her heirs and assigns forever.

I also give and bequeath to my said wife all horses, vehicles, harness, equipments and stable furniture of every description, which may at the time of my death be in my stables, or usually kept there.

[fol. 55] I except from these, of course, such horses, vehicles, harness and equipments as I have in my life-time given to my children, or either of them, such gifts being hereby confirmed.

I give to my wife my box in the Metropolitan Opera House as her sole property.

Fourth. I also give, devise and bequeath to my beloved wife Alice G. my residence and all the land and property which I own, or at the time of my death may own, in Newport, Rhode Island, not herein specifically devised, with all the furniture, pictures, silver, musical instruments and works of art not otherwise specifically bequeathed, and all articles, useful or ornamental, which may at that time be in or appurtenant to my said Newport residence; and also all my lands, with the stables and buildings thereon, on Coggeshall Avenue, Newport, with the equipment and furniture thereof, to have and to hold the same during the term of her natural life, and upon her death I give, devise and bequeath the same, in fee, to such one of my children, Alfred G., Reginald C., Gertrude and Gladys Moore, as she may designate for that purpose by her last Will and Testament; and in default of such designation the same shall become and be part of my residuary estate.

Fifth. My Oakland farm in South Portsmouth, Rhode Island, with all the buildings, furniture, equipments and appurtenances, together with all live stock or animals upon it, as the same shall be at the time of my death, I give and devise to my son Alfred G., to have and to hold, to him, his heirs and assigns forever; excepting, of course, any horses, vehicles, harness and equipments which I have previously given to my other children.

[fol. 56] Sixth. I also give and bequeath to my said wife absolutely, securities aggregating at their market value Two millions of dollars, to be selected by my Executors out of my estate, or in place thereof, should my wife so elect, Two million dollars in money.

Seventh. I also give and bequeath to my said wife the annual income or sum of Two hundred and Fifty thousand

dollars, payable to her quarterly, to be computed from the date of my death, and arising from securities to be selected from my estate and set apart by my Executors, and which I give to them to be held in trust for that purpose. If any such securities should be paid off during the continuance of this trust, the amount received therefrom shall be re-invested in similar railroad or other securities to be held by said trustees in place of the securities so paid off.

Eighth. At the death of my wife the principal set apart under the Seventh Clause of my Will to create the annual payment of Two hundred and Fifty thousand dollars to my wife, shall be given to our children, Gertrude, Alfred G., Reginald C. and Gladys Moore; and if any then be dead, to their issue, in such proportions and amounts as my said wife may direct or appoint in her last Will and Testament, and in default of such appointment the same shall be divided among our said four children equally, share and share alike, the issue of any such child or children to take its parent's share, per stirpes and not per capita. Any child born to us after my death shall be entitled to share in this division, and in case of the death of either of said children, without issue, the share of such child is to go to the survivors of such children in equal shares.

[fol. 57] Ninth. Exercising the power therein given, I direct that my share in the trust of Five million dollars, which is now held in trust for me under the Seventh Clause of my father's will, be at my death paid, Five hundred thousand dollars to my son Cornelius, and the balance of the principal of said trust of Five million dollars be equally divided among my other children, share and share alike, the issue of any deceased child to take its parent's share, per stirpes and not per capita.

Tenth. I give and bequeath to my Executors, hereinafter named, One million dollars in securities held by me at the time of my death, to be chosen and taken at their market value by my Executors for that purpose, and held by them in trust to the use of my son Cornelius, to collect and receive the income thereof and to pay the net income as collected to my said son Cornelius from my death during the term of his natural life, and upon his death to divide said principal into as many shares as my son Cornelius shall leave children him surviving, and to hold one of such shares

to the use of each such child during the term of the natural life of the youngest child of my son Cornelius who may be living at the time of my death, appropriating so much of the income thereof as such Trustees may deem desirable to the support, maintenance and education of the several children respectively, and accumulating any surplus for his or her benefit during his or her minority, if the trust shall so long exist, and on his or her arriving at majority to pay all accumulations of income to such child. On the death of the youngest child of my son Cornelius, who shall be living at the time of my death, the principal of such fund shall be [fol. 58] paid over to the child for whose use the same shall be held respectively; but if my son Cornelius should die leaving no issue him surviving, then at his death the principal so set apart for his benefit shall become and be part of my residuary estate; and if either of his children should survive him and die before attaining majority, and without issue, the principal set apart for such child shall become part of my residuary estate.

I direct that no payment be made in anticipation of such income and that no part of either of such trust funds be paid over or alienated during the life of the person entitled to the income therefrom.

Eleventh: I give and bequeath to my said Executors, the survivors and survivor of them, Twenty million dollars in securities held by me at the time of my death, to be selected out of my estate and set apart at their market value by my said Executors, the survivors and survivor of them, who shall divide the same into four parcels or shares, each one of said parcels so set apart to contain, in their judgment, as nearly as may be an equal amount of each kind of securities, and shall hold one of said parcels in trust for the use of my daughter Gertrude, one for my son Alfred G., one for my son Reginald C. and one for my daughter Gladys Moore, and shall collect and receive the income from such separate parcels, and pay the same as collected to the son or daughter for whom it is set apart, during the natural life of such sons or daughters. I direct that no payment be made in anticipation of such income and that no part of said trust fund be paid over or alienated during the life-time of the person entitled to the income thereof, and upon the death of the beneficiary of such trust, I direct that such [fol. 59] principal be paid to his or her lawful issue in such

share or proportion as such beneficiary may by his or her last Will and Testament appoint, and in default of such testamentary appointment I direct that such parcel be divided into equal shares among the children of such beneficiary, per stirpes and not per capita; and in default of such issue, to be paid to the survivors of my children Gertrude, Alfred G., Reginald C. and Gladys Moore, in equal shares; and if either of them be dead, leaving issue then living, such issue shall take in equal shares the share the parent would have taken if living.

Twelfth. I authorize the trustees of the several trust funds, created under this my Will, to receive and re-invest the moneys or proceeds of stocks and bonds constituting such trust funds as they mature, and if they think best to sell any of the same, to make sales thereof, and I authorize them to hold such funds and securities and, from time to time, in their discretion, to change the investments of such trust funds, and I direct that they shall at all times keep the same invested in stocks and bonds of the United States or of the State of New York, or the mortgage bonds of the New York Central and Hudson River Railroad Company; the Lake Shore and Michigan Southern Railroad Company; the Michigan Central Railroad Company; the New York and Harlem Railroad Company and the Chicago and North Western Railway Company, or in bonds guaranteed by some one or more of the said Railroad Companies; also in bonds secured by mortgage on improved real estate in the City of New York; and I expressly authorize them to invest any of said trust funds in the mortgage bonds of any railroad company which may be approved for that purpose by all of my Executors who may qualify.

[fol. 60] I direct that all of the securities in which trust funds may from time to time be invested, be taken and held by my said trustees in their names, as trustees, for the parties respectively for whose benefit the certain funds are severally set apart and held, so that each of said trust funds may be kept separate and distinct from all others, and that the accounts thereof may be separately kept.

Thirteenth: I give to my mother, as a mark of affection, One hundred thousand dollars, and I give to my brother William K. Vanderbilt One hundred thousand dollars.

I give and bequeath to my friend Chauncey M. Depew Two hundred thousand dollars.

I give and bequeath to Edward V. W. Rossiter, Fifty thousand dollars.

To John Hone, Fifty thousand dollars.

To the Reverend Dr. David H. Greer, Fifty thousand dollars.

To Charles C. Clarke, Twenty-five thousand dollars.

To Franklin Allen, Twenty-five thousand dollars.

To Maud Gwynne Shepard, Twenty-five thousand dollars.

To John Rutgers Leroy, Twenty thousand dollars.

To Charles F. Cox, Ten thousand dollars.

To Edgar T. Chapman, son of Reverend E. T. Chapman, of Watervliet, New York, Ten thousand dollars.

To George R. Fearing, Ten thousand dollars.

To Reverend Dr. William S. Langford, Ten thousand dollars.

To George A. Warburton, Ten thousand dollars.

[fol. 61] To Robert R. McBurney, Ten Thousand dollars.

To J. R. Hatmaker, Ten Thousand dollars.

I direct my Executors to set apart out of my estate, in separate funds, sufficient money or securities to produce the following several annuities, and to pay from the income of one of such sums in each year to Mrs. William Turnbull, through James H. Breslin, the sum of Twelve Hundred dollars; and to pay from the income of one of such sums in each year the sum of Twelve hundred dollars to John G. Earle; and from one of such sums in each year, to pay to Mrs. Jeremiah Simonson the sum of Twelve hundred dollars, and in like manner; annually to pay to Mrs. Sarah Simonson the sum of Six hundred dollars; and to Mrs. Cornelia Littell, annually, the sum of Two hundred dollars. Upon the death of the several annuitants the principal sums set apart to create such annuity shall become and be added to and be part of my residuary estate. The income from all such annuity funds to be paid from the date of my death.

Whenever in my will, or in any Codicil to my Will, my Executors are authorized or directed to do anything the same shall be done by them, the survivors or survivor of them, or of such of them as may qualify, and their judgment shall be final in respect of any division of my estate to be made by them. None of my Executors shall be responsible either as Executor or Trustees, for the acts, omissions or defaults of any other of my Executors or trustees, nor shall

either of them be called upon to give bonds as security under this my Will.

Fourteenth. I give and bequeath to the Young Men's Christian Association of the City of New York, One Hundred thousand dollars, and I desire that so much of the in- [fol. 62] come arising therefrom as can be usefully employed for that purpose be used for Christian work among railroad employees, and I direct that such income be paid over to Frederick W. Vanderbilt, Chauncey M. Depew, Charles C. Clark, George H. Watrous, J. Pierpont Morgan and John M. Toucey, and the survivors or survivor of them, being the Trustees named in a certain indenture of Lease, dated June 30th, 1886, made by the New York Central and Hudson River Railroad Company and the New Haven and Hartford Railroad Company, parties of the first part, and myself and the Trustees above named, parties of the second part, of premises on the Northeast corner of Madison Avenue and Forty-fifth Street, to be applied by said Trustees to the purposes in their view intended to be accomplished by the building erected on said premises; but should said trusteeship cease, and said building be no longer used for the purposes for which it was erected, then the Young Men's Christian Association shall exercise their judgment as to the manner of disposing of such annual income for the benefit of Railroad employees.

I give and bequeath to the Rector, Church Wardens and Vestrymen of St. Bartholomew's Church, the sum of Two hundred thousand dollars, to be kept safely invested by the said corporation, the annual income to be derived therefrom to be applied, under the direction of the Vestrymen of the Church, to the missionary work of said Parish.

If a building should not have been erected for Church purposes before my death, upon the two lots adjoining said building on East Forty-second Street, now used for Church purposes, I give and bequeath to the Rector, Church Wardens and Vestrymen another Two hundred thousand dollars to erect a fire-proof building upon said two lots, satisfactory [fol. 63] to the Rector. If any amount remains of said last named sum, after the completion of such building, such amount shall be added as principal to the first-named sum of Two hundred thousand dollars, which I have given in this clause of my Will for the missionary work of the Parish.

I give and bequeath to Yale University of New Haven, Connecticut, the sum of One hundred thousand dollars.

To St. Luke's Hospital in the City of New York, Fifty thousand dollars.

To the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, Fifty thousand dollars.

To the Board of Trustees of Vanderbilt University, Nashville, Tennessee, Fifty thousand dollars.

To the Redwood Library at Newport, Rhode Island, Ten thousand dollars.

To the Newport, Rhode Island Hospital, Ten thousand dollars.

To the Christian Home for Intemperate Men in New York, Ten thousand dollars.

To the Manhattan Working Girls' Society of the City of New York, Ten thousand dollars.

To the New York Bible and Common Prayer Book Society, Ten thousand dollars.

I direct that my Executors pay to the Society of St. Johnland, a corporation formed under the laws of this state, the sum of Two thousand dollars annually, so long as the said Society keeps and performs its convenants with me and my wife expressed in a written agreement dated April 13th, 1892, and I authorize my Executors to set apart, or to purchase securities, or to keep them as a trust fund, sufficient to realize the sum of Two thousand dollars per annum for [fol. 64] such purpose, and they may make such arrangements and settle with said Society with reference to said annuity as they may deem advisable.

I also give and bequeath to said Society of St. Johnland Ten thousand dollars.

I give to the Protestant Episcopal Society, for Seamen in the City and Port of New York, Ten thousand dollars.

I give and bequeath to the Metropolitan Museum of Art in the City of New York, one oil painting by J. M. W. Turner, designated as the "Grand Canal, Venice."

Fifteenth: I give and bequeath to each of my family servants, male and female, who have been in my stable or house for two years next preceding my death, one thousand dollars. I give and bequeath to John H. Dempsey five thousand dollars. To Charles A. Whittaker, my coachman, Two thousand dollars. To Toney, my barber for many years, Two

thousand dollars; to John Allen, my farmer, Two thousand dollars.

Sixteenth. I give to my son Alfred G. the gold medal voted by the Congress of the United States to my grandfather Cornelius Vanderbilt in 1865, at the close of the war of the rebellion. If my son Alfred G. be not living, I give the medal to my son Reginald C., and if neither of them are living to my eldest daughter, and I request that the child receiving this medal will leave the same to his or her oldest son with the request that the same may pass to his oldest son.

Seventeenth. All the rest, residue and remainder of all the property and estate, real, personal and mixed, of every de- [fol. 65] scription, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed, or from any other source, I give, devise and bequeath to my Executors, hereinafter named, and the survivors and survivor of them, in trust, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my Executors and the survivors of them. And upon further trust thereafter to pay to my said son Alfred G. the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years when he shall be put in possession of the balance of said trust estate, and the said Trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my Executors into

[fol. 66] as many equal shares as he may leave children him surviving, and one share shall be held by my Executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my Will that my son Reginald C. shall in all respects, as to said residuary estate stand in the place and stead of his brother Alfred G., and that if Alfred shall die without issue before he attains the age of thirty years then Reginald C. shall receive the income from said estate until he attains the age of thirty years when he shall be put in possession of one-half the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one-half of my estate, and on arriving at the age of thirty-five years shall be put into possession of the whole of said estate, and my said Executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters, Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, per stirpes and not per capita; and in default of issue, the survivor shall take the principal.

Eighteenth. I direct that my Executors shall pay out of my estate any and every inheritance, transfer or legacy tax which shall be chargeable upon or under any gifts, devises or bequests made by me in this my Will by reason of such [fol. 67] gifts, devises or legacies under any law of the State of New York, or of the United States or any State therein.

Nineteenth. I nominate and appoint my wife Alice G. Executrix, and my brother William K. Vanderbilt and my friends Chauncey M. Depew and Edward V. W. Rossiter, Executors of this my Will; and I appoint my son Alfred G. and my son Reginald C., Executors thereof as soon as they shall respectively attain majority, and my Executors above named who shall qualify as such Executors, and the survivors or survivor of them, shall be Trustees under the several trust funds and estates by my Will created.

I direct that no compensation or commission, as such, shall be paid to any living Executor or Trustee under this Will, for any services as Executor or Trustee hereunder.

If all my Executors shall die or decline to act, or be incapable of acting, then I nominate and appoint the Union Trust Company in the City of New York, Executor of this my Will and Trustee of the several trusts therein created.

Whenever any single trust fund or any number of trust funds shall have been set apart by my Executors, pursuant to the provisions of this my Will for the execution of any trust thereby created, I authorize and empower my said Executors and Trustees to transfer and convey the property set apart for any such trust to the Union Trust Company of the City of New York, upon the trusts named in this my Will in respect thereof, upon such terms as may be agreed upon between my said Executors and Trustees and the Trust Company, and upon such funds being so transferred [fol. 68] to said Union Trust Company, and its assuming the trust, my Executors and Trustees shall be fully released and discharged with respect to all such trust funds, money and securities embraced in the trust fund so transferred.

Nineteenth. If my father's will and estate shall not have been settled, and I shall not have come into full possession of my share thereof, I authorize my Executors, the survivors or survivor of them, to agree upon a division or partition and to make such settlement, compromise or arrangement as they may see fit, and no inventory, list or accounting shall be required either in respect of my father's estate or my own, and my Executors are fully released from such inventory, list, appraisal or accounting; nor shall any bond be required in any State to qualify my said Executors to act as Executors or Trustees.

Twentieth. In addition to the powers given to my Executors, I authorize them, the survivors and survivor of them, to sell and convey at public or private sale, at such time and upon such terms as they may deem advisable, any and all of my real estate, and I authorize them to employ agents and clerks in and about the management of my estate at such salaries or compensation as to them shall seem reasonable and they shall be reimbursed and all expenses by them incurred shall be charged against such portion of the estate as they may think should reasonably pay the same.

Twenty-first. I hereby revoke all other and former Wills by me at any time made.

In witness whereof I have to this my last Will and Testament set my hand and seal in the City of New York, this [fol. 69] 18th day of June in the year one thousand eight hundred and ninety-six.

C. Vanderbilt. (Seal.)

Subscribed, sealed, published and declared by the said testator Cornelius Vanderbilt, to be his last Will and Testament in the presence of us and of each of us, who, at his request and in his presence, and in the presence of each other have hereunto subscribed our names as witnesses. Henry H. Anderson, 24 Gramercy Park, New York. J. Carstensen, 17 West 120th St., New York. G. S. Prince, Yonkers, N. Y.

CODICIL TO LAST WILL AND TESTAMENT OF CORNELIUS VANDERBILT

I, Cornelius Vanderbilt, do make, publish and declare the following Codicil to my Last Will and Testament bearing date the eighteenth day of June one thousand eight hundred and ninety-six.

First. In addition to the legacy to the Rector, Churchwardens and Vestrymen of St. Bartholomew's Church given in the fourteenth clause of my said Will, and the provisions in said clause subsequently made for the erection of a building for church purposes, and intending to further provide for the missionary work of St. Bartholomew's Parish, I give and bequeath to the Rector, Churchwardens and Vestrymen of St. Bartholomew's Church the further sum of [fol. 70] Two hundred thousand dollars to be safely invested by the said corporation, the annual income to be derived therefrom to be applied under the direction of the Vestrymen of the church to the missionary work of said Parish.

Second. In the nineteenth clause of my said Will I have nominated and appointed the Union Trust Company of the City of New York to be and act as Executor and as Trustee

of my said Will in certain contingencies, and given authority to my Executors to transfer and convey property set apart for certain trusts to said Trust Company also in certain contingencies all of which contingencies are set out in detail in the said nineteenth clause of my Will. I now revoke the provisions of the said nineteenth clause of my said Will, so far only as they apply to the Union Trust Company of the City of New York, and constitute and appoint the United States Trust Company of New York in its place, and direct that all and singular the provisions in the said clause which apply to the said Union Trust Company shall apply instead to the said United States Trust Company of New York. It is not my intention to, and I do not by this Codicil, in any way revoke or otherwise alter or disturb any of the provisions of the said nineteenth clause except to substitute in its provisions the said United States Trust Company for the said Union Trust Company, and with the said substitution I reaffirm the said nineteenth clause.

Third. As modified by this Codicil, I ratify and confirm my said Will.

In witness whereof I have to this Codicil to my Last Will and Testament subscribed my name and affixed my seal the [fol. 71] twenty-fourth day of April in the year one thousand eight hundred and ninety-seven.

C. Vanderbilt. (Seal.)

Subscribed, sealed, published and declared by Cornelius Vanderbilt, the Testator, as and to be a Codicil to his Last Will and Testament, in the presence of us and of each of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses. Henry B. Anderson, 113 East 57th St., New York City. G. S. Prince, 80 Ashburton Avenue, Yonkers, N. Y. Warren S. Crane, Jamaica, N. Y.

Second Codicil to Last Will and Testament of Cornelius Vanderbilt

I, Cornelius Vanderbilt, do make, publish and declare the following codicil to my last Will and Testament bear-

ing date the Eighteenth day of June One thousand eight hundred and ninety-six.

First. In addition to the provisions which, in my said last Will and Testament, I have made for the benefit of my daughter Gertrude V. Whitney, in my said Will referred to as Gertrude Vanderbilt, and without intending to alter or disturb any of such provisions, I give and bequeath to her the sum of One million dollars ($1,000,000) absolutely.

[fols. 72-116] Second: I give and bequeath to John A. Peterson, now in my employ, the sum of Ten thousand dollars ($10,000).

Third: On the Twenty-fourth day of April in the year One thousand eight hundred and ninety-seven, I made and published a codicil to my said last Will and Testament, and it is not my intention by the making and publishing of this codicil to in any way affect, alter or supersede that codicil, which I hereby ratify and confirm.

Fourth. As modified by this codicil, I ratify and confirm my said Will and codicil.

In witness whereof I have to this my Second Codicil to my last Will and Testament subscribed my name and affixed my seal the fourth day of April in the year One thousand eight hundred and ninety-nine.

C. Vanderbilt. (Seal.)

Subscribed, sealed, published and declared by the said Cornelius Vanderbilt, the Testator, as and for the Second Codicil to his last Will and Testament, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses. Edward L. Rossiter, 781 Carroll St. Bklyn. Chandler P. Anderson, 784 Fifth Avenue, New York City. Henry B. Anderson, 113 East 57th St., N. Y. City.

[fol. 117] EXPLANATORY MEMORANDUM OF STATE TAX COMMISSION CONCERNING ENACTMENT OF SUBDIVISION 7-A OF SECTION 249-R OF THE TAX LAW

State of New York

[Seal]

Department of Taxation and Finance
Albany

September 29, 1936.

Root, Clark, Buckner & Ballantine, 31 Nassau Street, New York City.

GENTLEMEN:

Your letter of September 26 to the State Librarian in regard to subdivision 7-a of Section 249-r of the Tax Law was referred to the Tax Library.

Although the minutes are taken of everything which transpires in the Senate and Assembly the time a bill is under discussion, yet these minutes are not transcribed unless there is a special request for them. When they are transcribed they are not for public distribution. This statement is without doubt true of what goes on in committees to which bills are referred; there is again no public record. However, as this bill was a Tax Department bill there was in the Tax Department files a memorandum written by the Tax Department counsel to the President of the Tax Commission. It is customary for the President of the Tax Commission to send memoranda on all tax department bills to the Governor. Department bills usually consist of ones which remedy discrepancies in the laws, usually introduced [fol. 118] in both houses by members of the committee on taxation and finance. They are very seldom bills over which there would be any controversy.

Enclosed is a copy of the memorandum in regard to this Section which was in the Tax Department files. I think this memorandum explains the situation.

Very truly yours,

Beulah Bailey, Research Assistant, Dep't. Taxation & Finance.

BB:T.

Chapter 320, Laws 1932

Amending Section 249-r of the Tax Law by the Addition of Subdivision 7-a

Under the inheritance tax laws in effect prior to September 1, 1930, where a person created a power of appointment, general, special or limited, provision was made that the property to which such power related should not be subject to death taxation in the estate of the grantor of the power in the event the power should be exercised, but should be taxable in the estate of the person exercising the power. Under the estate tax act in effect from 1925 to September 1, 1930, property transferred subject to general, special or limited powers of appointment was subject to tax in the estate of the grantor of the power. The estate tax law which took effect on September 1, 1930 taxes the exercise of a general power of appointment, but does not tax the exercise of a special or limited power of appointment. For this reason, property now transferred by the exercise of a [fol. 119] special or limited power of appointment created prior to September 1, 1930 may in some cases escape taxation in both the estate of the grantor and the estate of the grantee of the power. Equitably there should be one tax on property so transferred. This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property.

In Surrogate's Court, County of New York

In the Matter of the Appraisal of the Estate of Alice G. Vanderbilt, Deceased

Present—Hon. James A. Foley, Surrogate

Pro Forma Order Assessing Tax On Estate of Alice G. Vanderbilt—July 13, 1936

On reading the report filed the 25th day of May, 1936, of Jacob Manicoff, Esq., the appraiser appointed by order of

this Court, dated the 21st day of February, 1935, and it ap-
[fol. 120] pearing that the said decedent died on the 22nd day of April, 1934, it is

Ordered and adjudged that the market value of the gross estate of said decedent at the time of death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

Gross estate	$10,770,907.17
Total deductions allowed by statute	766,319.32
Net estate	$10,004,587.85
Tax on net estate not in excess of $150,000 less $55,950.00 exemptions allowed under Section 249-q	$940.50
Tax on net estate in excess of $150,000	1,334,871.69
Total tax	$1,335,812.19

J. A. F., Surrogate.

[fol. 121] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate of Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, Individually and as Executors

Sirs:

Please take notice that Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, are dissatisfied with the appraisal of the property of said decedent as made in the report of the appraiser filed herein on the 25th day of May, 1936, and with the order assessing, fixing and determining the estate tax in respect to the transfer of the property of said decedent made and entered herein on the 13th day of July, 1936, and hereby appeal to the Surrogate from said appraisal and from said order.

The grounds upon which said appeal is taken are:

I

That the inclusion in the gross estate of the above named decedent, Alice G. Vanderbilt, of the property or any part of the property constituting the principal of the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, which property consists of the cash, bonds and stocks set forth in Schedule F of the Return herein, appraised by the appraiser herein at $5,935,572.07, and over which property said Alice G. Vanderbilt exercised by the Third Article [fol. 122] of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt, is erroneous and illegal for the following reasons:

(a) That said property is not property referred to or described in Section 249-r of Article 10-C of the Tax Law; and in particular is not property the transfer of which is not or was not subject to a death tax in the estate of Cornelius Vanderbilt, the grantor of said power of appointment, but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof, and therefore is not property referred to or described in subdivision 7-a of said Section 249-r of Article 10-C of the Tax Law.

(b) That insofar as it purports to require the inclusion of said property or any part thereof in the gross estate of said Alice G. Vanderbilt for the purpose of measuring, fixing or determining the tax upon the transfer of her net estate, Article 10-C of the Tax Law is unconstitutional and void in that it deprives the appellants of their property without due process of law in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, and deprives them of the equal protection of the laws in violation of said Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

[fol. 123] II

That the inclusion in the gross estate of said Alice G. Vanderbilt (a) of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius

Vanderbilt as passed to the appellant Gertrude Vanderbilt Whitney, to wit, the sum of $150,000; and (b) of so much of said principal as passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, is erroneous and illegal in that said Gertrude Vanderbilt Whitney and said sons of said Alfred G. Vanderbilt took said sums of $150,000 and $500,000, respectively under the will of said Cornelius Vanderbilt and not under or by reason of the exercise of said power of appointment by said Alice G. Vanderbilt.

Dated, New York, September 4, 1936.

Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, Office & P. O. Address: 20 Pine Street, Borough of Manhattan, New York City.

To: Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City. Charles P. Sheridan, Clerk of Surrogate's Court, New York County.

[fol. 124] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate of Gladys Szechenyi

Please take notice that Gladys Szechenyi (heretofore named and referred to in the above-entitled proceedings as Countess Gladys Szechenyi) is dissatisfied with the appraisal of the property of said deceased as made in the report of the appraiser filed herein on the 25th day of May, 1936, and with the order assessing, fixing and determining the estate tax in respect to the estate of said deceased made and entered herein on the 13th day of July, 1936,

And does hereby appeal to the Surrogate from said appraisal and from said order.

The grounds upon which said appeal is taken are as follows:

I

That the inclusion in the gross estate of the above named decedent, Alice G. Vanderbilt, of the property or any part

of the property constituting the principal of the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, which property consists of the cash, bonds and stocks set forth in Schedule F of the Return herein, appraised by the appraiser herein at $5,935,572.07, and over which property said Alice G. Vanderbilt exercised by the Third Article of her will the special or limited power of appointment granted to her by the Eighth Clause of said [fol. 125] will of Cornelius Vanderbilt, is erroneous and illegal for the following reasons:

(a) That said property is not property referred to or described in Section 249-r of Article 10-C of the Tax Law; and in particular is not property the transfer of which is not or was not subject to a death tax in the estate of Cornelius Vanderbilt, the grantor of said power of appointment, but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof, and therefore is not property referred to or described in subdivision 7-a of said Section 249-r of Article 10-C of the Tax Law.

(b) That insofar as it purports to require the inclusion of said property or any part thereof in the gross estate of said Alice G. Vanderbilt for the purpose of measuring, fixing or determining the tax upon the transfer of her net estate, Article 10-C of the Tax Law is unconstitutional and void in that it deprives the appellants of their property without due process of law in violation of Section I of the Fourteenth Article of Amendment to the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, and deprives them of the equal protection of the laws in violation of said Section I of the Fourteenth Article of Amendment to the Constitution of the United States.

II

That the inclusion in the gross estate of said Alice G. Vanderbilt (a) of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius Vanderbilt as passed to the appellant Gertrude Vanderbilt [fol. 126] Whitney, to wit, the sum of $150,000; and (b) so much of said principal as passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Van-

derbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, is erroneous and illegal in that said Gertrude Vanderbilt Whitney and said Alfred G. Vanderbilt took said sums of $150,000 and $500,000 respectively under the will of said Cornelius Vanderbilt and not under or by reason of the exercise of said power of appointment by said Alice G. Vanderbilt.

Dated, New York, September 10, 1936.

Root, Clark, Buckner & Ballantine, Attorneys for Gladys Szechenyi, Appellant, Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, New York City.

To: Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City. Charles P. Sheridan, Clerk of Surrogate's Court, New York County. Messrs. Anderson, Gasser, Ferris & Anderson, Attorneys for Executors of Estate of Alice G. Vanderbilt, etc., 20 Pine Street, New York City.

[fol. 127] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate of Gloria Laura Morgan Vanderbilt, Infant, and of Thomas B. Gilchrist, as General Guardian of Her Property

Sirs:

Please take notice that Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist as General Guardian of her property, and Thomas B. Gilchrist as General Guardian of the property of said infant, the said Gloria Laura Morgan Vanderbilt, infant, being a person interested in the gross estate of Alice G. Vanderbilt, deceased, as a legatee under Article First of the Last Will and Testament of said deceased, and being also one of the remaindermen of a certain trust created under Clause Seventh of the Last Will and Testament of Cornelius Vanderbilt, deceased, who died a resident of the County of New York on September 12, 1899, the property comprising which said trust was not required to be included, but was in fact included, in the gross estate of said Alice G. Vanderbilt, deceased, are dissatisfied with the appraisal of the property of said Alice G. Vander-

bilt as made in the report of the appraiser filed herein on the 25th day of May, 1936, and with the order assessing, fixing and determining the estate tax in respect to the transfer of the property of said decedent made and entered herein on the 13th day of July, 1936, and hereby appeal to the Surrogate from said appraisal and from said order. [fol. 128] The grounds upon which this appeal is taken are as hereinafter severally set forth, viz.:

First

That the inclusion in the gross estate of the above named Alice G. Vanderbilt of the whole or any part of the property constituting the trust created by Clause Seventh of the Will of Cornelius Vanderbilt, deceased, which said trust fund was composed of the cash, bonds and stocks set forth in Schedule F of the Executors' Return herein, appraised by the Appraiser herein at $5,935,572.07, over which the said Alice G. Vanderbilt exercised by Article Third of her Will the special or limited power of appointment vested in her by Clause Eighth of the Will of Cornelius Vanderbilt is improper, erroneous and illegal for each and every one of the following separate and distinct reasons, to wit:

(a) For the reason that the property comprising said trust fund was not property which belonged to or was owned by the said Alice G. Vanderbilt at the time of her death and was in no sense the property of said deceased and did not constitute a part of her estate.

(b) For the reason that the property comprising said trust fund was not transferred by the said Alice G. Vanderbilt and did not pass under her Will or under the special or limited power of appointment exercised by her, but was transferred by and passed under the Will of Cornelius Vanderbilt, who died a resident of the City, County and State of New York on September 12, 1899.

(c) For the reason that the property comprising said trust fund does not constitute a part of the "gross estate" [fol. 129] of the said Alice G. Vanderbilt, deceased, as defined in Section 249-r of Chapter 10-C of the Tax Law or in any subdivision of said Section 249-r, and more particularly is not property referred to or described in subdivision 7-a of said Section 249-r and thereby required to be included in the decedent's "gross estate".

(d) For the reason that subdivision 7-a of Section 249-r of Chapter 10-C of the Tax Law does not apply to the property comprising said trust fund, in that the said Cornelius Vanderbilt died on September 12, 1899, and the transfer of the property comprising said trust fund was then the subject of a death tax imposed in certain transfer tax proceedings relative to the estate of Cornelius Vanderbilt, and a large and substantial transfer or death tax was then paid thereon to the State of New York by the estate of Cornelius Vanderbilt,

(e) For the reason that subdivision 7-a of Section 249-r of Chapter 10-C of the Tax Law does not apply to the property comprising said trust fund, in that the laws of the State of New York relating to taxable transfers of property which were in effect at the death of the said Cornelius Vanderbilt on September 12, 1899 did not, as appellants are informed and verily believe, provide for the taxation, in the estate of the donor of a power of appointment, of the transfer of a remainder or other future interest where the ultimate devolution thereof was uncertain or undetermined by reason of the fact that such remainder or future interest was given, devised or bequeathed subject to a power of appointment; and more particularly because Section 230 of the Tax Law as amended by Chapter 76 of the Laws of 1899 did not, as appellants are informed and [fol. 130] verily believe, apply, refer to or impose a death tax or other transfer tax upon the transfer of a remainder or future interest given, devised or bequeathed subject to a power of appointment.

(f) For the reason that the non-taxability in the estate of Cornelius Vanderbilt of the transfer of the remainder interests in said trust fund did not arise or result from the existence of a statute; and accordingly the said remainder interests are not property of the nature and character described or referred to in subdivision 7-a of Section 249-r of Article 10-C of the Tax Law and required thereby to be included in the "gross estate" of Alice G. Vanderbilt.

(g) For the reason that, even if there were a law of the State of New York in effect at the death of Cornelius Vanderbilt which rendered the transfer of the remainder interests in said trust fund subject to a death tax, then, in such case, said remainder interests were or would now be

taxable in the estate of said Cornelius Vanderbilt, and by the terms of subdivision 7-a of Section 249-r of Chapter 10-C of the Tax Law, the said remainder interests would not and do not constitute a part of the "gross estate" of Alice G. Vanderbilt, deceased, and should not have been included therein.

Second

That, if subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, or any other subdivision or section of said Article of the Tax Law, should be construed as requiring that the transfer of the trust fund created under Clause Seventh of the will of Cornelius Vanderbilt, deceased, be included to any extent in the gross estate of Alice G. Van- [fol. 131] derbilt (which appellants do not concede), then the value of said trust fund as appraised by the appraiser, and as fixed and determined by the taxing order from which this appeal is taken, is incorrect and erroneous, in that the said trust fund has been appraised at the market value of the capital of the trust fund at the death of Alice G. Vanderbilt, whereas at most only the remainder interests in said trust fund are taxable, and the said remainder interests should be appraised at the fair market value of the capital of the trust fund diminished by the value of the life interest of the late Alice G. Vanderbilt in said trust fund.

Third

That, if subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, or any other subdivision or section of said Article of the Tax Law, should be construed as requiring that the transfer of the trust fund created under Clause Seventh of the will of Cornelius Vanderbilt, deceased, be included to any extent in the gross estate of Alice G. Vanderbilt (which appellants do not concede), then the value of said trust fund as appraised by the appraiser, and as fixed and determined by the taxing order from which this appeal is taken, is incorrect and erroneous, in that the appraiser has improperly included in the value of said trust fund the sum of $150,000 which passed to Gertrude Vanderbilt Whitney and the sum of $500,000 which passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of the late Alfred G. Vanderbilt, whereas the said Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt

[fol. 132] have, as appellants are informed, elected to take said sums in the aggregate amount of $650,000 directly by the will of Cornelius Vanderbilt, deceased, and not by virtue of the special or limited power of appointment exercised or purported to be exercised by said Alice G. Vanderbilt.

Fourth

That, if said subdivision 7-a of Section 249-r of Article 10-C of the Tax Law or any other subdivision or section of said article of the said Tax Law, should be construed as requiring the inclusion in the "gross estate" of Alice G. Vanderbilt of the property or any part of the property constituting the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, said subdivision or subdivisions or sections would be unconstitutional in that they would deprive the appellants of their property without due process o. law in violation of Section I of the Fourteenth Article of Amendment to the Constitution of the United States of America.

Fifth

That, if the said subdivision 7-a of Section 249-r of Article 10-C of the Tax Law or any other section or subdivision of said Article of the Tax Law should be construed as requiring the inclusion in the "gross estate" of Alice G. Vanderbilt of the property or any part of the property constituting the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, said section or subdivision would be unconstitutional in that they would deprive appellants of the equal protection of the laws in violation of said [fol. 133] Section I of the Fourteenth Article of Amendment to the Constitution of the United States of America.

Sixth

That, if said subdivision of 7-a of Section 249-r of Article 10-C of the Tax Law or any other subdivision or section of said Article of the said Tax Law should be construed as requiring the inclusion in the "gross estate" of Alice G. Vanderbilt of the property or any part of the property constituting the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, said subdivision or subdivisions or sections would be unconstitutional in that they

would deprive the appellants of their property without due process of law in violation of Section 6 of the Constitution of the State of New York.

Seventh

That, upon each and every one of the grounds above stated, the amount of the estate tax as assessed, fixed and determined in the aforesaid pro forma order dated July 13, 1936, is excessive, and estate tax as fixed and assessed therein is unjust, incorrect and unlawful, and should be modified or set aside to the extent that it affects the interest of the infant, Gloria Laura Morgan Vanderbilt.

Appellants further expressly reserve their rights to enforce or require payment of the tax, if any, by the executors of the will of Alice G. Vanderbilt, deceased, pursuant to the provisions of Paragraph Thirteenth of said will, or by the executor of or the residuary legatees under the will of [fol. 134] Cornelius Vanderbilt, deceased, pursuant to the provisions of Clause Eighteenth of said will, and this appeal shall be without prejudice to the rights of appellants to require that any estate tax assessed or imposed herein shall be paid out of the residuary estate of Alice G. Vanderbilt, deceased, or out of the residuary estate of Cornelius Vanderbilt, deceased.

Dated: September 11, 1936.

Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant. Cadwalader, Wickersham & Taft, Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, New York City.

To: Messrs. Anderson, Gasser, Ferris & Anderson, Attorneys for Executors of the Estate of Alice G. Vanderbilt, deceased, No. 20 Pine Street, Borough of Manhattan, City of New York. Edgar Hirschberg, Esq., Attorney for State Tax Commission, No. 80 Centre Street, New York City. Clerk of the Surrogates' Court of the County of New York, Hall of Records, Borough of Manhattan, City of New York.

[fol. 135] IN SURROGATE'S COURT, COUNTY OF NEW YORK

NOTICE OF APPEAL TO SURROGATE OF CATHLEEN VANDERBILT LOWMAN

SIRS:

Please take notice that Cathleen Vanderbilt Lowman as one of the Appointees under the will of Alice G. Vanderbilt of the trust fund appointed under Paragraph Third of the will of said Alice G. Vanderbilt, is dissatisfied with the appraisal of the property of said decedent, as made in the report of the appraiser filed herein on the twenty-fifth day of May, 1936, and with the order assessing, fixing and determining the Estate Tax in respect of the transfer of the property of said decedent made and entered herein on July 13, 1936, and hereby appeals to the Surrogate from said appraisal and from said order.

The grounds upon which said appeal is taken are:

I. That the inclusion in the gross estate of the above-named decedent, Alice G. Vanderbilt, of the value of the property or any part thereof constituting the principal of the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, consisting of the cash, bonds, and stocks set forth in Schedule F of the return herein, appraised by the appraiser herein at $5,935,572.07 and over which property said Alice G. Vanderbilt exercised by the [fol. 136] Third Article of her will a special or limited power of appointment granted to her by the Eighth Clause of the said will of Cornelius Vanderbilt, is erroneous and illegal for the following reasons:

A. That under the provisions of Article 10-C of the Tax Law, the value of the said property or any part thereof should not have been included in the gross estate of the decedent, Alice G. Vanderbilt, and not taxed therein.

B. That insofar as it purports to require the inclusion of said property or any part thereof in the gross estate of said Alice G. Vanderbilt for the purpose of measuring, fixing or determining the tax upon the transfer of her net estate, Article 10-C of the Tax Law is unconstitutional and void, in that it deprives the appellant of her property without due process of law in violation of Section I of the Fourteenth Article of Amendment to the Constitution of the

United States and Article 1, Section 6 of the Constitution of the State of New York, and deprives her of the equal protection of the laws in violation of said Section I of the Fourteenth Article of Amendment to the Constitution of the United States.

II. That the inclusion in the gross estate of said Alice G. Vanderbilt (a) of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius Vanderbilt as passed to the appellant Gertrude Vanderbilt Whitney, to wit, the sum of $150,000; and (b) of so much of said principal as passed in equal shares to William H. [fol. 137] Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, is erroneous and illegal in that said Gertrude Vanderbilt Whitney and said sons of said Alfred G. Vanderbilt took said sums of $150,000 and $500,000 respectively under the will of said Cornelius Vanderbilt and not under or by reason of the exercise of said power of appointment by said Alice G. Vanderbilt.

This appeal is taken by the appellant, Cathleen Vanderbilt Lowman, on the grounds aforesaid, by reason of the fact that the report of the appraiser and the order assessing the tax herein have included as a part of the "gross assets" of the estate of Alice G. Vanderbilt, deceased, the remainder interests in the said trust fund created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased.

In taking this appeal, the said appellant does not concede that the said remainder interests in the said trust fund are required to be included in the "gross assets" of the estate of the said Alice G. Vanderbilt, deceased.

This appeal is also taken without prejudice to the right of the said appellant, Cathleen Vanderbilt Lowman, in the event that the tax herein, or any part thereof, is sustained and eventually apportioned to the said appellant, to claim that the Executor of the will of the said Cornelius Vanderbilt, deceased, is obligated to make payment of the full amount of such tax, if any, or to reimburse the appellant for any part of the said tax which may be apportioned to her together with her expenses in taking this appeal, all

[fol. 138] pursuant to the provisions of the Eighteenth Clause of the will of Cornelius Vanderbilt, deceased.

Dated, New York, N. Y., September 11, 1936.

Yours, etc., Leboeuf, Winston, Machold & Lamb, Attorneys, for Cathleen. Vanderbilt Lowman, Office and Post Office Address, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

To: Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, Borough of Manhattan, New York, N. Y. Charles P. Sheridan, Esq., Clerk of Surrogate's Court, New York County, Pearl & Centre Streets, Borough of Manhattan, New York, N. Y.

[fol. 139] In Surrogate's Court, County of New York

Opinion and Decision of Surrogate Foley—Filed June 7, 1937

(163 Misc. 667)

Estate of Alice G. Vanderbilt

This is an appeal by the executors and by individual beneficiaries from the pro forma order of July 13th, 1936 fixing the estate tax upon the appraiser's report.

Cornelius Vanderbilt died on September 12th, 1899. Under his will, among other bequests, he gave to his wife, Alice G. Vanderbilt, the decedent here, a fixed annual income of $250,000. Provision was made for the setting aside of a trust fund of securities sufficient to pay that annual amount. He conferred upon her a limited power of appointment over the principal of the fund restricting her in her disposition to legacies to be given to their issue in such shares as she should direct in her last will. In default of the exercise by Mrs. Vanderbilt of this limited power, he provided that the fund be divided among their four children equally, with substitution in case of the death of any of them to their issue or to the survivors where there was no issue of any deceased child.

Mrs. Vanderbilt died on April 22nd, 1934. Her will exercised the power of appointment by specific reference to the terms of her husband's will. She gave to her daughter,

Gertrude V. Whitney $150,000, and to the issue of her deceased son, Alfred $500,000. Of the residue she gave one-third to the issue of her deceased son, Reginald, and the remaining two-thirds to her daughter, Gladys Szechenyi.

In his report in the pending estate, the tax appraiser has found the value of the fund at the date of the death of Mrs. [fol. 140] Vanderbilt to have been $5,935,572.07. He has taken the full value of the fund without reference to any deduction for the value of the life estate of Mrs. Vanderbilt. He has added the full undiminished value to the personal estate left by her. The combined gross estate as found by him is $10,770,907.17. The net estate is fixed at $10,004,587.85. A tax has been assessed against the succession to this amount in the sum of $1,335,812.19. By the inclusion of the appointed fund the total tax has been increased by approximately $900,000. and the tax upon her personal estate has been increased by approximately $200,000.

The grounds of appeal are first that there was erroneously included as part of the decedent's gross estate the appraised value of the appointed fund, and second that there was erroneously included in the appraised value of the appointed fund, (a) the amount of the appointed legacy bequeathed by Mrs. Vanderbilt to her daughter, Mrs. Whitney, and (b) the amounts of the appointed legacies passing to the three children of her son Alfred. Upon the second ground of appeal these beneficiaries asserted a right to elect to take their shares under the donor's will and thereby to renounce the lesser benefits derived by them under the donee's will.

The second ground of appeal may be disposed of readily. It is sustained. The amounts payable to the designated legatees under the exercise of the appointment are less than they would have received had the power not been exercised. In default of the power they would have taken greatly increased shares under the will of Cornelius Vanderbilt. Under such circumstances the law is clear that they may elect to take under the will of the donor and not under the [fol. 141] exercise of the power by the donee. (Matter of Ripley, 122 App. Div. 419, aff'd. 192 N. Y. 536; Matter of Slosson, 216 N. Y. 79; Matter of Taylor, 121 Misc. 7, aff'd. 209 App. Div. 299, aff'd. 239 N. Y. 582.) By this disposition these legacies do not escape taxation for they become taxable in the estate of the donor in a proper proceeding. The amounts, however, of their respective shares must be eliminated from the gross estate of the decedent here and the

tax recomputed. The pro forma order in this respect is therefore modified.

There remains for disposition the first ground of appeal. It is contended in the briefs of the appellants (1) that subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, under which the appraiser included the appointed fund as part of this decedent's gross estate, did not permit such inclusion; (2) that if that section did authorize such inclusion it is violative of both Federal and State constitutions since the State has attempted to tax property without due process of law by imposing a tax upon the exercise by the donee of a limited power of appointment; (3) that property passing under a limited power is not the property of the donee of the power and that by reason of the substitution by the Legislature in 1930 of an estate tax (Article 10-C) in place of the former transfer tax (Article 10) such property may not be included in the gross estate of the donee of the power; and (4) that if the fund be held taxable there should be deducted therefrom the value of the life estate of this decedent. All these contentions and the entire ground of appeal are overruled.

[fol. 142] It is unnecessary to discuss at length the principles applicable to the taxation of powers of appointment which have been so clearly fixed by the Court of Appeals. These well established rules dispose of many of the arguments of the appellants. Briefly stated these rules are as follows: (1) the property passing under the exercise of a power of appointment is taxable in the donee's estate; (2) regardless of any technical question as to the donee's title it is the donee's exercise of the power that renders it taxable in his estate; (3) it is the exercise of the power rather than the creation thereof which effected the transfer and therefore no transfer is taxable until the power is exercised, or it is found that default in exercising the power has actually occurred; (4) the exercise of the power is taxable in the donee's estate even though at the time of the creation of the power there was no law in force taxing such transfers; (5) the Court of Appeals has drawn no distinction between general and limited powers of appointment and the latter are taxable in the donee's estate, when exercised; and (6) it is only where the donee of the power fails to exercise it that the fund or property subject to the power is referred back to the donor's estate for taxation.

Under the Transfer Tax Law prior to 1897, property passing, pursuant to the exercise of a power of appointment, was taxable only in the estate of the donor. (Matter of Stewart, 131 N. Y. 274.) That policy was changed by Chapter 284 of the Laws of 1897, which provided for the taxation of such property in the estate of the donee. This modification was accomplished by the addition of subdivision 5 to Section 220 of the Tax Law (enacted April 16, 1897.) It was in effect at the date of death of Cornelius [fol. 143] Vanderbilt on September 12th, 1899. Subdivision 5 provided:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

Thereafter the Legislature by Chapter 76 of the Laws of 1899 (in effect March 14, 1899) amended Section 230 of the Tax Law to provide:

"When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred. * * *"

The Court of Appeals held that the latter amendment in no way affected or repealed subdivision 5 of Section 220 set forth above. (Matter of Howe, 176 N. Y. 570.) At the date of death of Cornelius Vanderbilt, therefore, the Tax Law [fol. 144] specifically provided for the imposition of the tax in the donee's estate in the event that the power was exercised. In the exaction of a tax under this section, the court did not differentiate between general and limited powers of appointment. The leading authorities have sustained the taxability of a limited power. (Matter of Vanderbilt, 50

App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, 167 N. Y. 227, sustained sub-nom Orr v. Gilman, 183 U. S. 278; Matter of Howe, supra; Matter of Delano, 176 N. Y. 486; Matter of Wendel, 223 N. Y. 433.) The tax was imposed in the donee's estate even though at the time the power was created there was no law in force taxing such transfers. (Matter of Vanderbilt, 50 App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, supra.) The same treatment was accorded powers created by deeds executed long before the existence of any transfer tax law. (Matter of Delano, supra.)

It will thus be seen that the contentions of the appellants in so far as they question the condition of the law existing at the date of death of Cornelius Vanderbilt in 1899 are without support in the authorities. A limited power of appointment was taxable in the donee's estate. Taxation was postponed until the death of the donee. The constitutional authority of the State to tax had been sustained by the United States Supreme Court in Chanler v. Kelsey, 205 U. S. 466 sustaining Matter of Delano, 176 N. Y. 486, Orr v. Gilman, 183 U. S. 278.

The addition of the appointed fund here to the individual property of Mrs. Vanderbilt was therefore proper.

Equally untenable is the contention of the appellants that the order which fixed the tax in the Estate of Cornelius [fol. 145] Vanderbilt is res judicata. It is asserted in this connection that the failure to include a specific provision in the order in that estate suspending taxation until the death of the donee, was a complete and final adjudication that the appointive fund was forever exempt from taxation. It is also asserted that the Court of Appeals in its decision on the appeal from that order in some way held the transfer to be taxable only in the estate of the donor. Both of these claims find no support in the applicable law or in the actual adjudications in the tax proceeding in Mr. Vanderbilt's estate.

Upon the first contention it has been the law of this State for many years that the omission in the appraiser's report or in the order entered thereon, of a provision suspending taxation of the remainder of a fund is not an adjudication as to the exemption of the estate of the donee where the power was exercised or an adjudication as to the exemption of the estate from future taxation in default of the exercise of the power. (Matter of Naylor, 189 N. Y. 556, aff'g. 120

App. Div. 738; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969; Matter of Goldenberg, 187 App. Div. 692; Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837; Matter of Carey, 197 App. Div. 566, aff'g. 115 Misc. 732 on opinion below; Matter of Jesup, 155 Misc. 846.) It was the practice in the Surrogate's Courts throughout the State after the enactment in 1897 of Section 220, subdivision 5, to make a simple order taxing the actual transfers in the donor's estate. The existing law itself provided for taxation in the event of the exercise or non-exercise of the power. (Matter of Howe, supra.) [fol. 146] The mention of postponement or suspension in the order was therefore unnecessary. In 1899 when Mr. Vanderbilt died there was no specific provision for suspension in the statute. That provision came into the law in 1911 (Chapter 800, Laws of 1911, in effect July 28, 1911) with respect to taxing contingent remainders and suspending the tax until the actual eventuality became fixed. These amendments and the cases which construe them, however, have no application to the present estate except as historical interest. (Matter of Zborowski, 213 N. Y. 109; Matter of De Cordova, 199 App. Div. 492, aff'd. 234 N. Y. 514.) In Matter of Duff, Matter of Naylor and Matter of Goldenberg cited above, there was no express provision for suspension in the original order but its absence in each of these cases was held not to preclude the fixation of the tax in subsequent years under statutory authority. It is stated in Matter of Goldenberg, supra, that the circumstance that the order is silent as to a transfer or estate does not bar the parties interested from asserting their rights in a subsequent proceeding "for the only matters that are res judicata are those embodied in an order or judgment and not those omitted therefrom" (187 App. Div. 692, at page 696.)

Here, taxation of the remainder was properly held in abeyance and the mere statement in the appraiser's report of the valuation of the remainder of the fund was sufficient to indicate that the right to tax was reserved by the State for future determination. The defense of res judicata is not available to the executors or legatees on this phase of the case.

Upon the alternative ground urged as res judicata, neither [fol. 147] the record in Matter of Vanderbilt, 172 N. Y. 69, nor the determinations of the lower courts, nor the decision of the Court of Appeals sustain the executor's contentions

that the final determination in that proceeding is conclusive in the present proceeding. The Court of Appeals did not hold that a tax should have been imposed in the donor's estate upon the appointive fund. There is no indication whatsoever in its opinion that the transfer was declared taxable in that estate. The appeal of the State Comptroller whereby he sought to tax the appointive fund presently in the donor's estate was abandoned before the case reached the Court of Appeals. The final determination of that Court did not affect the fund involved in this proceeding. It was the residuary trust fund that was considered, which, as stated by Chief Justice Cullen in his analysis of the Vanderbilt decision, in the Matter of Burgess (204 N. Y. 265 at page 269) contained "no power of appointment". The decision only sustained the validity of Section 230 of the Tax Law and held that under its provisions the tax on the contingent residuary interests was immediately payable out of the estate to be computed at the highest rate at which any contingency the property might be taxable.

Undoubtedly, if the Court of Appeals had been asked to rule upon the alleged contradiction between the terms of Section 230 and Section 220 of the Tax Law it would have held in Matter of Vanderbilt, as it subsequently held in Matter of Howe, 176 N. Y. 570, that the amendment of Section 230 did not repeal or nullify the provisions of Section 220. It would have held that property passing under a power of appointment should be taxed in the donee's estate as the [fol. 148] section directed just as if the donee of the power was the owner of the property. It would have held further just as it did in Matter of Howe, supra, that the remainders were not taxable until the death of the donee and the final ascertainment of exercise or non-exercise. Furthermore on the question of res judicata the order entered in the Surrogate's Court on the remittitur of the Court of Appeals and upon the stipulation of the parties contained no reference to the taxability of the appointive fund or its exemption. At the time of the preparation and entry of that order there must have been a complete and proper understanding by the attorneys, both for the State and the estate, of the reservation of the right of the State to tax in a subsequent proceeding.

The remaining contention of the appellants involves the interpretation of subdivision 7-a of Section 249-r of the

Tax Law and its applicability to the estate of the donee. That section provides in general as to the manner of the valuation of the gross estate and in particular for the inclusion within it of certain special types of property. The opening sentence of the Section reads:

"*Gross Estate*—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * * ."

Then follow the enumeration and description of the special kinds of property. Subdivision 7-a of the Section reads:

"To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, * * * [fol. 149] exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The history of this enactment throws light upon its meaning. When the Decedent Estate Commission, in cooperation with the State Tax Commission, drafted the new Estate Tax Law, the context and policies followed in great part those of the Federal Estate Tax Statutes. The recommendation of the two Commissions was adopted by the Legislature and became Article 10-C of the Tax Law. It became effective on September 1st, 1930. Prior to that date Section 220 of the Tax Law authorized the imposition of a tax in the donee's estate upon the exercise of a power of appointment whether general or limited. The new Estate Tax Law, beginning at the date mentioned above, imposed a tax in the donee's estate only upon the exercise of a general power of appointment. Such was the Federal policy. Limited powers were exempted from taxation by the omission of any express statutory authority to tax them.

In respect of the policy of New York State to tax limited powers in the estate of the donee it was apparent that the terms of the new statute of 1930 substantially changed the

previous rule and permitted such powers to escape taxation in the donee's estate. Thereupon the State Tax Commission [fol. 150] drew the provisions of subdivision 7-a to supplement subdivision 7 which taxed only general powers. The new subdivision 7-a became effective on March 21, 1932. Mrs. Vanderbilt died on April 22, 1934. If her death had occurred between September 1, 1930 and March 21, 1932 the fund here would have been free from taxation. Its succession could not have been taxed in the donor's estate, because the statutory provisions in existence at the date of Cornelius Vanderbilt's death made it taxable, if the power was exercised, only in the estate of the donee. (Section 220.) It could not have been taxed as part of the estate of Mrs. Vanderbilt because it was a limited or special power and its succession was exempt. An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the Surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7-a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure: "This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event that it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property."

Entirely aside from this memorandum, as I construe the legislative intent in the enactment of the subdivision, it provided for the inclusion in the gross estate of the donee [fol. 151] of property passing under a special or limited power of appointment under the exact terms of the power exercised by Mrs. Vanderbilt and given to her under the will of her husband. The subdivision may be paraphrased as follows: (1) if the original grantor's estate was subject to a tax and impliedly that tax had been paid, no further tax would be imposed under the terms of the subdivision in the donee's estate; (2) if the estate of the grantor would have been taxable except for a statute, which provided that the tax on the transfer of the property should be imposed in the

estate of the grantee, taxation of the fund under the subdivision must be enforced in the grantee's estate when the power is exercised.

This latter statement covers the exact situation in Cornelius Vanderbilt's estate. If Section 220 had not been in existence the tax would have been imposed under Section 230 upon the appointed fund in his estate. The application of Section 220 provided the alternative mentioned in subdivision 7-a for the assessment of the tax in the grantee's estate and exempted the estate of Mr. Vanderbilt from taxation in the event of the exercise of the power. It should be noted in this aspect of the case that counsel for the appellants in their briefs have overlooked those decisions which have held that in default of the exercise of the power, a tax could have been imposed validly in the estate of the grantor. (Matter of Naylor, 189 N. Y. 556; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969 on the opinion of the Surrogate; Matter of Goldenberg, 187 App. Div. 692.)

Moreover Matter of Burgess, 204 N. Y. 265, cited by them instead of supporting their claims sustains the opposite conclusion reached by the Surrogate. That case only ap- [fol. 152] plied to a power that was contingent, because the right to appoint given by the terms of the will was subject to such conditions that it might never come into existence. In that case the present taxability in the donor's estate was therefore sustained. There were certain trusts, however, in the estate where the powers were vested and not contingent. The Court held that the funds affected by such powers were not presently taxable. Taxation was postponed until exercise and was necessarily required to be assessed in that event in the donee's estate.

The power given by Mr. Vanderbilt to his wife was a vested power and not a contingent power. It was subject to no conditions or contingencies except the choice of his wife to exercise it or not. The latter privilege did not affect the inherent nature of the power as absolutely vested in her. Matter of Burgess, supra, is therefore authority for the conclusion reached by the Surrogate.

Finally there is no unconstitutionality in the inclusion by the Legislature of a statutory declaration that a fund subject to a limited power shall be deemed to be part of the grantee's property. I have pointed out that the question of the constitutionality of the legislative authority to levy that form of taxation was set at rest many years ago by the

United States Supreme Court. (Chanler v. Kelsey, 205 U. S. 466, sustaining Matter of Delano, 176 N. Y. 486; Orr v. Gilman, 183 U. S. 278, sustaining Matter of Dows, 167 N. Y. 227; Matter of Zborowski, 213 N. Y. 109.)

It is the exercise of the power which is the basis of the authority to tax. The Legislature for taxing purpose has created artificial estates which include items clearly not owned in title or in fee by the decedent. Thus it has included [fol. 153] by definition insurance on the decedent's life payable to a designated beneficiary and accruing only at the death of the insured. Irrevocable trusts, in which the decedent has only retained a life interest are included in the gross estate. Similarly, interests in inter vivos trust funds where the enjoyment is subject to change by the exercise by the decedent of a power to alter, amend or revoke are included. The privilege to transmit the appointed fund by will is one conferred by the State. By taxing the privilege the Legislature in its exactments violates neither the Federal or State Constitution.

It is within the authority of the Legislature not only to declare the appointive property to be a part of the estate of the grantee, but also to make the passing of such property subject to the rates of tax in force at the date of death of the grantee; to provide for the exemptions to certain relations and charities at that time and not at the time of the death of the grantor; to fix the rates of tax based upon the relationship of the beneficiaries to the donee and not to the donor; to combine the individual property of the donee with the appointed property in order to compute the rate of tax; to tax the property in its character, realty or personalty, as it exists at the date of death of the donee and to fix its value as of that date rather than at the date of death of the grantor. (Matter of Dows, 167 N. Y. 227; Matter of Sandford, 250 App. Div. 310, N. Y. L. J. March 13, 1937; Matter of Rogers, 71 App. Div. 461, aff'd. on opinion below 172 N. Y. 617; Matter of Walworth, 66 App. Div. 171; Matter of Seaver, 63 App. Div. 283; Matter of Duryea, 250 App. Div. 305, N. Y. L. J. March 13, 1937; Matter of Bucki, 172 App. Div. 455.)

[fol. 154] For similar reasons, the statutes in existence at the date of death of the donee determine the amount of the appointive fund and whether it is to be taxed undiminished or diminished by the value of the life estate of the life tenant. The contention of the appellants that the value of the

securities within the fund at the date of the death of Mrs. Vanderbilt—$5,935,572.07—must be reduced by the deduction of the value of her life estate is overruled. The statute in effect in 1934 at the date of her death made no provision for such deduction. The whole fund as it exists at the date of death of the donee must be included in the gross estate. Similar contentions as to parallel prior statutes have been overruled by the courts. (Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837.) Since the law in effect at the date of the death of the donee applies, it is likewise immaterial whether the form of tax effective as of that date is a transfer tax or an estate tax. (Matter of Wendel, 223 N. Y. 433; Matter of Keeney, 194 N. Y. 281; Keeney v. N. Y., 222 U. S. 525.)

The difference between the two forms of tax is inconsequential. Simplicity in the method of assessment was effected by the enactment of the Estate Tax Law in 1930. The ultimate charge of the tax against the respective shares is practically the same under both systems of taxation. When the Estate Tax Law was adopted by the Legislature there was also enacted as part of the general program, new Section 124 of the Decedent Estate Law which provides, (in the absence of a contrary direction in the will) for the equitable apportionment and charging of the tax out of the benefits received by the respective legatees. The tax is imposed under either method upon the privilege to transmit the prop- [fols. 155-158] erty by the will of the donee. The privilege may be given or withheld by the State.

The value of the diminished remainder set forth in the appraiser's report in the estate of Cornelius Vanderbilt and the order entered upon it is not conclusive here. The Surrogate was without jurisdiction to fix the value of such remainder in that proceeding. The Surrogate and the appraiser were limited to the valuation of the life estate. (Matter of Naylor, 189 N. Y. 556, aff'g. 120 App. Div. 738; Matter of Bucki, 172 App. Div. 455, 457; Matter of Seligmann, 170 App. Div. 837.)

Submit order on notice overruling the first ground of appeal and sustaining the second ground of appeal and modifying the order fixing the tax in accordance with the provisions of this decision.

J. A. F.

[fol. 159] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Hon. Francis Martin, Presiding Justice; Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

6072

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

ORDER OF AFFIRMANCE—October 28, 1938

Appeals having been taken to this Court by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors etc. of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, and Gladys Szechenyi, and by Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of her property, and Thomas B. Gilchrist, as General Guardian of the property of said infant, and by Cathleen Vanderbilt Lowman, from an order of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 28th day of September, 1937, except only so much thereof as sustains the appeals from the pro forma order entered July 13th, 1936, to the extent [fol. 160] of excluding from the gross estate of Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt, and George Vanderbilt, and said appeals having been argued by Mr. Arthur A. Ballantine of counsel for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors etc., Cornelius Vanderbilt, individually, and Gladys Szechenyi; by Mr. Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant; by Mr. Horace R. Lamb of counsel for Cathleen Vanderbilt Lowman, and by Mr. Mortimer M. Kassell of Counsel for the respondent, State Tax Commission; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order so far as appealed from be and the same is hereby affirmed with costs to the respondent.

Enter.

F. M.

[fol. 161] IN SURROGATE'S COURT, COUNTY OF NEW YORK

Present: Hon. James A. Foley, Surrogate.

In the Matter of The Appraisal Under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

ORDER ON REMITTITUR—November 29, 1938

An appeal having been taken to the Appellate Division of the Supreme Court for the First Department by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and by said Cornelius Vanderbilt, individually, and by Gladys Szechenyi, and by Cathleen Vanderbilt Lowman, and by Gloria Laura Morgan Vanderbilt, an infant, and by Thomas B. Gilchrist, Esq., as General Guardian of the property of Gloria Laura Morgan Vanderbilt, an infant, from an order of the Surrogate's Court of the County of New York, made and entered on the 28th day of September, 1937, modifying the pro forma order of said Surrogate's Court, made and entered herein on the 13th day of July, 1936, fixing and determining the estate tax herein, and said appellants having appealed from each and every part of said order made and entered on the 28th day of September, [fol. 162] 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of Alice G. Vanderbilt, Deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, and the State Tax Commission having also appealed from said order of September 28, 1937, but having abandoned said appeal,

And, the said Appellate Division having duly heard said appeal, and after due deliberation had thereon having ordered and adjudged that the order of this Court appealed from be affirmed with costs, and having remitted the proceedings to this Court for further action,

Now, upon reading and filing the remittitur from said Appellate Division, and upon motion of Jerome M. Hirsch,

Esq., attorney for the New York State Tax Commission, respondent, it is

Ordered that the said order of said Appellate Division, dated October 28, 1938, be and the same hereby is made the order of this Court, and it is

Further ordered and decreed that, pursuant to the aforesaid order, the State Tax Commission of the State of New York recover from the appellants the sum of $107 65/100 costs and disbursements as taxed.

James A. Foley, Surrogate.

[fol. 163] In Supreme Court of New York, Appellate Division

[Title omitted]

Order Granting Leave to Appeal—December 16, 1938

A motion having been made by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, appellants herein, for leave to appeal to the Court of Appeals from the order of this Court entered [fol. 164] herein on the 28th day of October, 1938,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Roy C. Gasser in support of said motion, and the affidavit of Mortimer M. Kassell in opposition thereto, and after hearing Mr. Roy C. Gasser for the motion, and Mr. Mortimer M. Kassell opposed,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter.

F. M.

[fol. 165] IN SURROGATE'S COURT, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL AS OF RIGHT

Please take notice that Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of the property of said infant, and Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, hereby appeal to the Court of Appeals from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 28th day of October, 1938, which order unanimously affirmed, in so far as appealed from, the final order of the Surrogate's Court of the County of New York entered in the office of the Clerk of said Surrogate's Court on the 28th day of September, 1937, and a certified copy of which order of said Appellate Division was filed in the office of the Clerk of said Surrogate's Court on the 29th day of [fol. 166] October, 1938, and from the order of the Surrogate's Court of the County of New York made on the 29th day of November, 1938 and entered in the office of the Clerk of said Surrogate's Court on the 30th day of November, 1938, pursuant to said order of affirmance of said Appellate Division; and this appeal is from the whole and each and every part of said order of affirmance of said Appellate Division and from the whole and each and every part of said order of the Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division.

Dated, New York, N. Y., November 30, 1938.

Anderson, Gasser, Ferris & Anderson, Attorneys for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, and said Cornelius Vanderbilt, Individually, Office and Post Office Address, 20 Pine Street, Borough of

Manhattan, City of New York. Root, Clark, Buckner & Ballantine, Attorneys for Appellant, Gladys Szechenyi, Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, City of New York. Thomas B. Gilchrist, As General Guardian of the Property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. [fol. 167] Cadwalader, Wickersham & Taft, Attorneys for Appellant, Thomas B. Gilchrist, as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. Le Boeuf, Machold & Lamb, Attorneys for Appellant, Cathleen Vanderbilt Lowman, Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

To: Jerome M. Hirsch, Esq., Attorney for Respondent, State Tax Commission, 80 Centre Street, Borough of Manhattan, City of New York; Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Respondent Gertrude Vanderbilt Whitney, Individually, 20 Pine Street, Borough of Manhattan, City of New York. George Loesch, Esq., Clerk of the Surrogate's Court, New York County. George T. Campbell, Esq., Clerk of the Appellate Division of the Supreme Court, First Department.

[fol. 168] In Surrogate's Court, County of New York

[Title omitted]

Notice of Appeal Pursuant to Leave of Appellate Division

Please take notice that, pursuant to leave granted by the Appellate Division of the Supreme Court, First Judicial Department, in the above entitled proceeding, by an order duly made and filed in the Office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 16th day of December, 1938, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, Gladys Szechenyi,

Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of the property of said infant, and Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, hereby appeal to the Court of Appeals from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 28th day of October, 1938, which order unanimously affirmed, insofar as appealed from, the final order of the [fol. 169] Surrogate's Court of the County of New York entered in the office of the Clerk of said Surrogate's Court on the 28th day of September, 1937, and a certified copy of which order of said Appellate Division was filed in the office of the Clerk of said Surrogate's Court on the 29th day of October, 1938, and from the order of the Surrogate's Court of the County of New York made on the 29th day of November, 1938 and entered in the office of the Clerk of said Surrogate's Court on the 30th day of November, 1938, pursuant to said order of affirmance of said Appellate Division; and this appeal is from the whole and each and every part of said order of affirmance of said Appellate Division and from the whole and each and every part of said order of the Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division.

Dated, New York, N. Y., December 17, 1938.

Anderson, Gasser, Ferris & Anderson, Attorneys for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, and said Cornelius Vanderbilt, Individually, Office and Post Office Address, 20 Pine Street, Borough of Manhattan, City of New York. Root, Clark, Buckner & Ballantine, Attorneys for Appellant, Gladys Szechenyi, Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, City of [fols. 170-172] New York. Thomas B. Gilchrist, as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. Cadwalader, Wickersham & Taft, Attorneys for Appellant, Thomas B.

Gilchrist, as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, Infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. Le Boeuf, Machold & Lamb, Attorneys for Appellant, Cathleen Vanderbilt Lowman, Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

To: Jerome M. Hirsch, Esq., Attorney for Respondent, State Tax Commission, 80 Centre Street, Borough of Manhattan, City of New York. Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Respondent Gertrude Vanderbilt Whitney, Individually, 20 Pine Street, Borough of Manhattan, City of New York. George Loesch, Esq., Clerk of the Surrogate's Court, New York County. George T. Campbell, Esq., Clerk of the Appellate Division of the Supreme Court, First Department.

[fol. 173] In Court of Appeals of New York

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur—July 11, 1939

[fol. 174] In the Matter of the Appraisal under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Dec'd

Be It Remembered, That on the 10th day of January, in the year of our Lord one thousand nine hundred and thirty-nine, Gladys Szechenyi and others, the appellants in this cause, came here unto the Court of Appeals, by Root, Clark, Buckner & Ballantine and others, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And State Tax Commission, the respondent in said cause, afterwards appeared in said Court of Appeals by Jerome M. Hirsch, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 175] Whereupon, The said Court of Appeals having heard this cause argued by Messrs. Arthur A. Ballantine and Thomas B. Gilchrist, of counsel for the appellants, and by Mr. Mortimer M. Kassell, of counsel for the respondent, State Tax Commission, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court there to be proceeded upon according to law.

[fol. 176] Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted unto the Surrogate's Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogates thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, July 11, 1939

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal State of New York, Court of Appeals.)

[fol. 177] Certificates to opinion omitted in printing.

[fol. 178] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Appraisal under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

GERTRUDE VANDERBILT WHITNEY et al., as Executors of Alice G. Vanderbilt, Deceased, et al., Appellants; State Tax Commission and Gertrude Vanderbilt Whitney, Individually, Respondents

Appeal from an order of the Appellate Division, first department, affirming an order of the Surrogate determining the value of the estate of the decedent for the purpose of the estate tax imposed by article 10-C of the Tax Law.

Arthur A. Ballantine, Roy C. Gasser, Thomas B. Gilchrist, Horace R. Lamb and Leo Gottlieb for Gertrude V. Whitney et al., as executors, et al., appellants.

Thomas B. Gilchrist and Hampton D. Ewing, Jr., for Thomas B. Gilchrist, as general guardian of the property of Gloria L. M. Vanderbilt, an infant, appellant.

Mortimer M. Kassell and Harry T. O'Brien, Jr., for State Tax Commission, respondent.

OPINION—July 11, 1939

LEHMAN, J.:

Alice G. Vanderbilt died on April 22, 1934. Her "gross estate" was appraised at $10,120,907.17. Deductions of $766,319.32, allowed by statute, left a "net estate" of $9,354,587.85. A transfer tax measured by that "net estate" has been assessed. The decedent was the widow of Cornelius Vanderbilt, who died in September, 1899. By his will Cornelius Vanderbilt created a fund to provide an income of $250,000 to his wife during her lifetime. He directed that at the death of his wife "the principal set apart . . . to create the annual payment of two hundred and fifty thousand dollars to my wife, shall be given to our children, Gertrude, Alfred G., Reginald C. and Gladys Moore; and if any then be dead, to their issue, in such proportions and amounts as my said wife may direct or appoint in her last Will and Testament, and in default of such appointment the

same shall be divided among our said four children equally, share and share alike, the issue of any such child or children to take its parent's share, per stirpes and not per capita." The decedent Mrs. Vanderbilt exercised the power of appointment conferred upon her. At her death the fund which was subject to that power was appraised at $5,935,572.07, and the full amount was included in the decedent's taxable estate by the tax appraiser. This, the appellants contend, was error.

By the exercise of her power of appointment the decedent gave to one daughter and the issue of a deceased son far [fol. 179] more than they would otherwise have received under the will of Cornelius Vanderbilt, thus correspondingly reducing the amount which the other daughter and the issue of the other son would have received if she had failed to exercise her power. The legatees, who received less through the exercise of the power than they would otherwise have received, have asserted a right to elect to take under the will of the creator of the power. The Surrogate has sustained their right to such election and the State does not challenge that ruling. Their legacies, then, are taxable, if at all, as part of the estate of Cornelius Vanderbilt, the donor of the power, and the amounts which they have received have been eliminated from the gross estate of Mrs. Vanderbilt, the donee of the power. (Cf. Matter of Duryea, 277 N. Y. 310.) Upon this appeal the question is whether the shares of the trust fund passing to the other daughter and grandchildren in accordance with the exercise of the power of appointment by the donee of the power were properly included in the gross estate of Mrs. Vanderbilt subject to tax as part of her estate. The shares so included constitute the major portion of the trust fund and more than half of the estate of Mrs. Vanderbilt, the donee of the power.

The property which was included in Mrs. Vanderbilt's estate did not at any time belong to her. It did not at her death pass from her to those whom she appointed to take. Her power of appointment was not general. By its exercise she could obtain no benefit for herself, her creditors or her estate. During her life the fund was held by trustees under the terms of the will of Cornelius Vanderbilt. She enjoyed under his will a life interest in the fund, and a tax measured by the value of that life interest was paid upon the death of Cornelius Vanderbilt. The remainder, which

would vest in others upon her death, was not included in the tax assessed upon the transfer of his property. Mrs. Vanderbilt might, by exercise of her power of appointment, determine the shares which members of a limited group defined by the will of Cornelius Vanderbilt should receive out of property in the estate of Cornelius Vanderbilt and held by trustees under his will. When she exercised that power she gave her appointees nothing which belonged to her and she relinquished no rights which she might have asserted for herself. Nevertheless, the transfer of that property has been taxed in her estate and not in the estate of Cornelius Vanderbilt. The tax so imposed is many times greater than it would have been if the transfer had been taxed in the estate of the donor of the power. The appellants maintain that the Tax Law (Cons. Laws, ch. 60), properly construed, does not authorize the inclusion in the taxable estate of Mrs. Vanderbilt of property which was in [fol. 180] no real sense a part of her estate, and that the Legislature could not authorize its inclusion without violation of restrictions placed by the Constitution of the United States upon the legislative power. The questions raised require a detailed statement and analysis of the history of the statutes of the State imposing death duties and of the proceedings had in fixing the tax upon the estate of Cornelius Vanderbilt in accordance with the statute in effect at his death.

The Tax Law then in effect (Laws of 1896, ch. 908), as amd. by Laws of 1897, ch. 284) provided that "a tax shall be and is hereby imposed upon the transfer of any property * * * in the following cases;

"1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state. * * *

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exer-

cise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." (§ 220, subds. 1 and 5.)

We are concerned primarily with those provisions of the statute which might apply to taxation of transfers of property effected through the exercise of a power of appointment by the donee of the power. We are not concerned with those provisions of the statute which might apply where there has been failure to exercise such a power.

Thus when the tax was assessed on the estate of Cornelius Vanderbilt though the life estate passing under the testator's will to his wife was at that time subject to a tax as part of his estate, the transfer of the fund at the death of his wife, either by her exercise of the power of appointment conferred upon her or, upon her failure to exercise that power, in accordance with the terms of the will of the donor [fol. 181] of the power was declared by the statute to be taxable only at the date of the death of the donee of the power "in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statute, it is clear, is not intended to draw any distinction between general powers of appointment and special or non-beneficial powers. It applies to every form of power. It was so construed and applied in assessing the tax upon the transfer of the estate of Cornelius Vanderbilt, and we are not referred to any case in which any other construction was urged "where there is an absolute gift of a power of appointment." (Cf. Matter of Burgess, 204 N. Y. 265, 270.) Such an absolute gift of a power of appointment was made here. Even though choice by the donee of the power was limited to a small group of persons and there may have been a theoretical possibility that none of that group would be in existence at the time fixed for the exercise of that power, yet under all possible circumstances the property was "certain to pass under the exercise or non-exercise of the power of appointment," and, therefore, the transfer was

taxable in the estate of the donee. That would not be true where the gift of the power is to take effect only in contingencies which might never arise. In that respect this case differs from Matter of Burgess (supra), where the testator himself chose the persons to whom remainders should pass in certain contingencies, and conferred a power of appointment upon his trustees only if those contingencies did not arise. The property affected by the power contingently given was in that case included in the taxable estate of the donor of the power, for otherwise, if the contingency upon which the gift of the power was to become effective should not arise, the transfer would not, under the statute, have been subject to any tax.

It should perhaps be added that until 1930 there was little, if any, reason based on any practical consideration why there should be differentiation between general powers of appointment and limited or non-beneficial powers. All transfers of the property of residents of the State by will or by the intestate laws were to be taxed. Transfers effected directly by the will of the resident owner were, of course, to be taxed in the estate of the testator; transfers effected by exercise of a power of appointment conferred by such will were to be taxed as if the property had belonged to the donee of the power. The rate of taxation was not then measured by the size of the decedent's estate and would not be affected by the provision of the statute that a transfer of that property by the exercise of a power of appointment should be taxed as part of the estate of the donee of the power rather than of the donor. That provision was, then, hardly more than a new and convenient rule of administra- [fol. 182] tion. Under earlier statutes, taxing transfers by decedents, this court had held that "where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power," and is taxable as part of the estate of the donor. (Matter of Stewart, 131 N. Y. 274, 281.) Even then it was necessary to postpone assessment and collection of the tax until the death of the donee, for under the earlier statutes it was held, too, that contingent remainders, or remainders which, though technically vested, were defeasible, could not be taxed until they vested indefeasibly. (Matter of Curtis, 142 N. Y. 219; Matter of Burgess, supra.) By taxing transfers of property effected through exercise of a power of

appointment as if the property had belonged to the donee of the power rather than to the donor, the tax procedure was simplified, and at times the administration of the estate of the donor could be closed earlier than would otherwise have been possible.

The Tax Law was further amended by chapter 76 of the Laws of 1899 so as to provide: "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article." (§ 230.) In accordance with these provisions, which went into effect a short time before the death of Cornelius Vanderbilt, contingent estates or interests created by his will were taxed tentatively at the highest possible rate. (Matter of Vanderbilt, 172 N. Y. 69.) Such contingent estates then taxable did not, however, include any estate or interest in the trust fund to which Mrs. Vanderbilt's power of appointment related, for in construing the statute this court had held that "it is the exercise of the power * * * which effects the transfer which the statute makes taxable," and that section had no application in such case. (Matter of Howe, 86 App. Div. 286, 288; affd. on opinion below, 176 N. Y. 570.)

The State regulates succession to a decedent's property. It permits an owner to provide by will to whom his property shall be transferred upon his death. He may appoint the person to whom the property shall go or he may give to another a power of appointment to be exercised at some future time. If the donee of the power is given a life interest in the property and a general power of appointment which he may exercise for his own benefit, his rights of enjoyment and control are closely analogous to the rights of an owner. Even then, however, it remains theoretically [fol. 183] true that the property does not become his and by exercise of the power of appointment he transfers to the appointee a title which relates back to the instrument creating the power.

The statutory rule ignores all such theoretical considerations when it requires that a transfer effected through exercise of the power of appointment shall be taxed "in

the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statutory rule was, nevertheless, based soundly upon practical considerations which the Legislature decided should control. "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." (Matter of Dows, 167 N. Y. 227, 231; affd. sub nom., Orr v. Gilman, 183 U. S. 278.) For that reason this court held that a tax may be imposed upon a transfer effected through exercise of the power, and that is true though "there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed, and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else." (Matter of Delano, 176 N. Y. 486, 494.) In affirming that decision the Supreme Court of the United States pointed out that: "It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others. Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title." (Chanler v. Kelsey, 205 U. S. 466, 474.) The statutory rule treating the execution of the power as the real source of title is, therefore, not arbitrary; at least, so long as the tax is not measured by the size of the estate of the person who makes the transfer. Mere postponement of the assessment of the tax is not a ground for complaint to the court. That is true even though the rate of taxation might be changed in the interval between the death of the donor of the power and the death of the donee or even though in the interval the tax laws were so amended that transfers previously not taxable were subjected to a tax. (Matter of Dows, supra.) Indeed, the appellants do not claim invalidity of the statutory rule on such ground; they claim it is invalid as applied in this case on grounds which we shall hereafter consider.

[fol. 164] We point out here, again, that we are concerned only with a transfer effected by the exercise of a power of

appointment, not with any transfer upon failure to exercise such power. A statutory rule that whenever the donee of a power shall omit or fail to exercise it, a transfer shall be deemed to take place as though the persons becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power taking effect at the time of such omission or failure, is without any foundation either in fact or in theory. In such case the donee of the power transfers nothing to the person who succeeds to the property of the donor of the power in accordance with the will of the donor or the intestacy laws in effect at his death. Therefore, this court held that the part of the statute was invalid which purported to tax in that manner succession to property through failure to exercise a power. (Matter of Lansing, 182 N. Y. 238.) That decision did not affect the provisions of the Tax Law for the taxation of transfers through exercise of the power. To conform to that decision the Legislature then amended section 220 of the Tax Law by omitting the provision for the taxation of transfers upon failure to exercise a power of appointment but left intact the provision for taxation of transfers effected through exercise of a power. (Laws 1911, ch. 732.) That provision is still part of the Tax Law (§ 220, subd. 4), though no longer applicable to persons dying on or after September 1, 1930.

It thus appears plain that the transfer of the fund, created by the will of Cornelius Vanderbilt, to provide an income for his wife during her lifetime, which took effect at her death, was not subject to a death tax in the estate of Cornelius Vanderbilt, because at the time of his death the statute provided that the tax on such a transfer, effected by exercise of a power of appointment, should be imposed in the estate of the donee of the power. It would have been imposed in the estate of Mrs. Vanderbilt, the donee of the power, if she had died before September, 1930, and no effective challenge could have been made to a tax so imposed. Prior to her death, however, the Legislature, by chapter 710 of the Laws of 1930, added article 10-C to the Tax Law, which substituted, in respect to persons dying after it took effect, an estate tax similar to the Federal estate tax (in place of the tax imposed by the earlier statute which we have described as an inheritance tax; Matter of Cregan, 275 N. Y. 337). That involves, it has been said,

a "distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death." (Knowlton v. Moore, 178 [fol. 185] U. S. 41, at p. 77.) The older inheritance tax might be described as a tax on the privilege of receiving property on the death of another, and the new estate tax as a tax on the privilege of transmitting property upon death. (Coolidge v. Long, 282 U. S. 582.) These differences are not merely theoretical. They may carry practical consequences. The rate of the older inheritance tax was measured by the size of the interest received by the individual; the rate of the estate tax is measured by the size of the estate left by the decedent passing to few or many in accordance with the decedent's will or the intestacy laws. An inheritance tax, measured by the size of the interest received by an individual through the exercise of a power of appointment, though imposed in the estate of the donee of the power as if the transfer had been made by the donee of the property owned by him, produces no arbitrary inequality even where the power of appointment is a non-beneficial power and refers to property never owned by the donee. An estate tax measured by the size of the estate transmitted to others upon the owner's death might, however, produce unjust inequality if the law arbitrarily includes for such purpose any property which is in no real sense a part of the estate in which it is taxed. Accordingly, though the earlier "inheritance tax" statutes made no distinction between transfers effected through exercise of a general power of appointment and transfers effected through exercise of a limited or non-beneficial power, the statute of 1930 modelled upon the Federal estate tax laws incorporated a distinction previously drawn in the Federal statutes between transfers made through the exercise of "general" powers of appointment and transfers through the exercise of limited powers. It provided that the value of the gross estate of a decedent subject to the tax shall include the value of "any property passing under a *general* power of appointment exercised by the decedent." (§ 249-r, subd. 7.) The value of property passing under a limited power of appointment would thereafter be included in the value of the estate, subject to tax, of the donor of the power.

That left a gap in the Tax Law, through which a transfer effected thereafter by exercise of a limited power of appointment created by will of a testator dying before the statute

took effect would escape all taxation. To fill in that gap the Legislature, by chapter 320 of the Laws of 1932, added subdivision 7-a to section 249-r to provide that the value of the gross estate of a person dying thereafter should include the value of all property "passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed * * * intended to take effect in possession or enjoyment at or after, his death, * * * provided that [fol. 186] the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

It is plain that the purpose of the new subdivision was to restore the old rule that a transfer of property under a limited power of appointment exercised by a decedent should be taxed in the estate of the grantee of the power, in the small class of cases where otherwise the transfer would escape taxation. In those cases, the rule formulated in respect to an inheritance tax is to be applied now to an estate tax where the rate is measured by the size of the estate of the grantee of the power; and we are told that where, as in this case, the grantee did not own the property and the power of appointment could not be exercised by the grantee for his own benefit, such a tax produces a result so arbitrary and unjust that it would violate the provisions of the Fourteenth Amendment of the Constitution. At least, it is said, the validity of such a tax would be so doubtful that the statute should be construed in manner which would avoid the doubt.

We are urged for that reason to limit the words "property passing under a power of appointment" to property in which the decedent had or could acquire a beneficial interest, and for analogy and precedent we are referred to a series of cases in the Federal court exemplified by Helvering v. Parker (84 Fed. Rep. [2d] 838), where the courts have held that the Federal Estate Tax Law (§ 302-g; U. S. Code, tit. 26, § 411, subd. [g]), requiring the inclusion, in a decedent's taxable estate, of the proceeds of life insurance policies "taken out by the decedent upon his own life" did not apply where the insured reserved no right to surrender and cancel the policies, to pledge them for loans or to dispose of their proceeds for his own benefit during his life

and no other beneficial right incidental to ownership or control. (Cf., also, Reinecke v. Northern Trust Co., 278 U. S. 339; Helvering v. Holmholtz, 296 U. S. 93; White v. Poor, 296 U. S. 98.)

"A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (United States v. Jin Fuey Moy, 241 U. S. 394, 401; cf. Knowlton v. Moore, supra, at p. 77.) Tax statutes "*in case of doubt* • • • are construed most strongly against the Government, and in favor of the citizen." (Gould v. Gould, 245 U. S. 151, 153.) (Italics in both cases are ours.) Here, however, the purpose of the statute is clearly expressed and the construction urged upon us is not "*fairly possible.*" The original statute made no distinction between beneficial or general power and [fol. 187] limited or non-beneficial powers. The new statute does make the distinction between "general" powers and other powers, but it is clear that a transfer under any power of appointment, not general, which was taxable under the old statute in the estate of the donee of the power is intended to be so taxable also under subdivision 7-a of section 249-r. We cannot give to the statute a more limited application. If the subdivision does not apply in this case the passing of title to this property will escape taxation. That was not the legislative intent.

The serious question in this case is whether the tax violates the Constitution of the United States. The State has a broad power of taxation, but in the exercise of that power it may not provide a measure for a tax which is entirely arbitrary and which produces inequality and injustice so great as to deprive a taxpayer of the equal protection of the law. So it has been held that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." (Heiner v. Donnan, 285 U. S. 312, 325.) Taxation, it has often been pointed out, is an intensely practical matter. The Legislature may not arbitrarily fix the measure of a tax by a fiction. (Hoeper v. Tax Commission, 284 U. S. 206.) Always there must be some reason based on fact, not fiction, for imposing a particular tax upon a particular class, and absence of any basis for the classification may not be hidden by an arbitrary creation of a conclusive presumption. (Schlesinger v. Wisconsin, 270 U. S. 230.)

The Supreme Court has authoritatively stated the rule which in such cases creates invalidity: "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." A statutory rule is beyond the power of the Legislature if the result would be "that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in fact by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description." (Heiner v. Donnan, supra, p. 327; cf. Nichols v. Coolidge, 274 U. S. 531; Frew v. Bowers, 12 Fed. Rep. [2d] 625.)

The standard of what is arbitrary and unreasonable is not rigid. As we have often pointed out, the question is usually one of degree. A difference in the facts, seemingly [fol. 188] slight; an emphasis on one factor rather than another, may produce varying results. Even in the cases cited there was division of opinion in the court, though the difference of opinion concerned only the application of the general rule. The rules are too well established to be challenged. The facts present in this case are so different from those presented in the cited cases that they furnish at best imperfect analogies.

In considering the validity of the tax three factors must constantly be kept in mind: the nature of the tax, the measure of the tax and its incidence. Perhaps repetition is unnecessary, but we again point out that the statute in effect at the death of Cornelius Vanderbilt imposed no tax upon an inchoate transfer of a decedent's property to be effected thereafter by exercise of a power of appointment. Under that statute and under the present statute "it is the practical transfer through the exercise of the power by will that is taxed and nothing else." (Matter of Delano, supra, p. 494.) In 1932, when the Legislature enacted subdivision 7-a of section 249-r, the "practical transfer" had not been made. The Legislature was free at that time to impose a tax upon such transfer by a decedent dying thereafter, even if the earlier tax statute had imposed no such tax. (Chanler v. Kelsey, supra.) The Legislature chose to lay an "estate" tax measured by the aggregate of the property which was in a practical sense transferred by the will

of the grantee of the power. Though the tax is paid out of the estate of the decedent, the Decedent Estate Law (Cons. Laws, ch. 13) provides that the tax so paid "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." (§ 124.) We may, therefore, properly assume that Mrs. Vanderbilt's appointees will ultimately bear the main burden of the tax in proportion to the property received.

Since an estate tax is an excise laid in respect to the privilege of transmitting property rights at death (Coolidge v. Long, supra), it can hardly be said that the statutory rule that the rate of the tax should be measured by the aggregate of the property so transmitted is entirely without basis in fact, even though the decedent did not own some of the property but merely had a limited power of appointment. In the cases cited by the appellants property was included in the aggregate which measured the tax, though it was not transmitted to others at the death by the decedent. In those cases death did not result "in a shifting, or in the completion of a shifting, * * * of any economic benefit of property, which is the subject of a death tax." (Heiner v. Donnan, supra, p. 323.) There, by arbitrary choice to include in the "estate" of the decedent property [fol. 189] which did not pass at the decedent's death to which the estate was in no way related and from which the estate derived no benefit, the Legislature increased the rate of taxation upon the transfer of property which the decedent owned and transmitted. In the case we are now considering, no property is included in the aggregate which measured the tax which does not pass at Mrs. Vanderbilt's death to persons who take the property only because she so provided in her will. True, the inclusion of that property in Mrs. Vanderbilt's estate increases the rate of the tax which must be paid ultimately by those to whom the property owned by Mrs. Vanderbilt was transferred, as well as the tax which must be paid ultimately by those who receive property over which she had a limited power of appointment. Argument may be made that such a tax is not fair; indeed, the fact that under the Federal statute only a transfer of property under a general power of appointment is taxed in the estate of the grantee of the power indicates that Congress believed that it is fairer, as a general rule, that transfer under limited powers should be taxed in the estate

of the grantor of the power. Such "unfairness" does not, however, render the statute invalid.

The ultimate burden of an estate tax rests upon the persons to whom the estate is transferred. Since the tax is measured by the total transferred to one or many, each pays a tax measured, not by the benefit he receives, but in some degree by the benefit others receive. Argument might be made that all estate taxes are to that extent unfair, but estate taxes are not open to challenge on such ground. The question is always whether the classification is reasonable; incidental hardship resulting from a reasonable classification is no ground of attack. If an estate tax upon the transfer through the exercise of the power of appointment by Mrs. Vanderbilt were imposed now in the estate of Cornelius Vanderbilt in accordance with provisions of Article 10-C, perhaps the tax would be as large as if imposed in the estate of Mrs. Vanderbilt. The great disparity in the amount of the tax imposed in the estate of Mrs. Vanderbilt and the amount of the tax if imposed in the estate of Cornelius Vanderbilt is due to the fact that a tax in the estate of Cornelius Vanderbilt would be measured in accordance with the statute in effect at his death, though, as we have pointed out, the tax is upon the transfer effected by Mrs. Vanderbilt's will and should be taxed in accordance with statutes in force at her death. Its inclusion in an estate tax, measured by the aggregate of the property transferred under her will, is not so unreasonable that it may be challenged in the courts.

The classification so made applies only to transfers under a limited power of appointment created by the will of a [fol. 190] person dying prior to September 1, 1930. Transfers under such powers created by persons dying thereafter would be subject to a tax measured in a different way—and such tax might be higher or lower but would not be the same. That, it is said, denies to the taxpayer the equal protection of the law. In urging that contention the appellants lean heavily on the case of Binney v. Long (299 U. S. 280). In that case the Legislature based discrimination upon whether a transfer was made before or after a date which it arbitrarily chose. In the instant case the discrimination is not based upon a date arbitrarily selected but is a logical solution by the Legislature of a problem which it was required to meet. The discrimination, as we have already said, is

between a transfer under a limited power of appointment theretofore granted and a transfer under such a power thereafter granted, and it was calculated to prevent transfers thereafter effected under powers theretofore granted from escaping all taxation. That is not an arbitrary discrimination.

Other objections raised by the appellants have been rejected after careful consideration. We do not extend this opinion further by detailed analysis.

The order of the Appellate Division should be affirmed, with costs.

O'Brien, Hubbs, Loughran, Finch and Rippey, JJ., concur; Crane, Ch. J., taking no part.

Order affirmed.

[fol. 191] In Surrogate's Court, County of New York

Present: Hon. James A. Foley, Surrogate

In the Matter of the Appraisal under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

Order on Remittitur from the Court of Appeals—August 21, 1939

Appeals having been taken to the Court of Appeals in the above entitled proceeding as of right and also pursuant to leave granted by the Appellate Division of the Supreme Court, First Judicial Department by order made and filed in the office of the Clerk of said Appellate Division on the 16th day of December, 1938, by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and by said Cornelius Vanderbilt, individually, and by Gladys Szechenyi, and by Cathleen Vanderbilt Lowman, and by Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of the property of said infant, and by Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of said Appellate Division on the 28th day of October, 1938, which order unanimously affirmed, in so far as appealed from the final order [fol. 192] of the Surrogate's Court of the County of New

York entered in the office of the Clerk of said Surrogate's Court on the 28th day of September, 1937, and from the order of the Surrogate's Court of the County of New York made on the 29th day of November, 1938, and entered in the office of the Clerk of said Surrogate's Court on the 30th day of November, 1938, pursuant to said order of affirmance of said Appellate Division; and said appellants having appealed from the whole and each and every part of said order of affirmance of said Appellate Division and from the whole and each and every part of said order of said Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division;

And, the Court of Appeals having duly heard said appeals, and, after due deliberation had thereon, having ordered and adjudged that the said order of the Appellate Division of the Supreme Court, First Judicial Department, be affirmed with costs, and the remittitur from the Court of Appeals, together with a certified copy of the said order of affirmance of the Court of Appeals, having been filed in the Court;

Now, upon motion of Jerome M. Hirsch, Esq., attorney for the respondent, State Tax Commission, it is

Ordered that the said order of the Court of Appeals dated the 11th day of July, 1939 be, and the same hereby is, made the order of this Court, and it is further

Ordered that, pursuant to the said order of the Court of [fol. 193] Appeals, the respondent, State Tax Commission, recover from the appellants the sum of $139.10, costs and disbursements as taxed.

James A. Foley, Surrogate.

Filed August 22, 1939.

[fol. 194] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal to the Supreme Court of the United States—Filed October 13, 1939

On this 10th day of October, 1939, on reading the petition for appeal in this cause to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York in the above entitled suit, entered

in said Court on July 11, 1939, and in the Surrogate's Court of the County of New York on August 22, 1939, which said petition was presented on October 10, 1939, and the assignment of errors and the prayer for reversal and the jurisdictional statement, presented by the appellants pursuant to the statutes of the United States and to the Revised Rules of the Supreme Court of the United States in such case made and provided,

[fol. 195] It is Ordered:

(1) that an appeal be and the same is hereby allowed to the Supreme Court of the United States in the above entitled cause, as provided by law;

(2) that the Clerk of the Surrogate's Court of New York County in the State of New York shall prepare and certify a transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date; and

(3) that security for costs on appeal be fixed in the sum of $500.00, and the appellants having presented an undertaking in the sum of $500.00, executed by Fidelity and Deposit Company of Maryland, it is further ordered that such undertaking be and the same is hereby approved.

Done this 10th day of October, 1939.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 196] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 13, 1939

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioners, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius

Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as general guardian of the property of said infant, the appellants above named, respectfully show:

1. This proceeding was instituted in the Surrogate's Court of the County of New York, in the State of New York, for the purpose of assessing the estate tax upon the [fol. 197] estate of Alice G. Vanderbilt, deceased, as provided by Article 10-C of Chapter 60 of the Consolidated Laws of New York (New York Tax Law). Upon the estate tax return and petition for appointment of an appraiser submitted by the executors, appellants herein, and upon the appraisal and report of the appraiser appointed by the Surrogate, a pro forma order assessing tax was entered in the Surrogate's Court of the County of New York on July 13, 1936. This order assessed the estate tax upon the estate of Alice G. Vanderbilt, deceased, inclusive of the value of certain property of the estate of Cornelius Vanderbilt, deceased, passing to the individual petitioners and others by the testamentary exercise by Alice G. Vanderbilt, deceased, of a special or limited power of appointment. Such inclusion of property passing by the exercise of a special or limited power of appointment, for the purpose of measuring and assessing the estate tax, was purportedly under and pursuant to the terms of subdivision 7-a of Section 249-r of said Article 10-C of the New York Tax Law.

2. Your petitioners duly took an appeal as of right from said pro forma taxing order to Surrogate James A. Foley, one of the Surrogates of the Surrogate's Court of the County of New York in the State of New York. Such appeal was instituted by your petitioners' several notices of appeal, in each of which it was expressly assigned as grounds of the appeal that the estate tax assessed under and pursuant to Article 10-C of the New York Tax Law, upon the taxable estate of Alice G. Vanderbilt, deceased, inclusive of the property or any part of the property over which said deceased exercised by her will the special or limited power of appointment granted to her by the will [fol. 198] of Cornelius Vanderbilt, was erroneous and illegal, for the reason that in so far as it purports to require the inclusion of said property or any part thereof in the gross estate of said deceased for the purpose of measuring,

fixing or determining the tax, said Article 10-C is unconstitutional and void in that it deprives the appellants of their property without due process of law and deprives them of the equal protection of the laws, in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

3. Upon hearing such appeal Surrogate Foley made a decision based upon a written opinion filed June 7, 1937, which is reported in 163 Misc. 667, which opinion shows that the said Surrogate overruled the appeal of your petitioners in so far as they contended that said Article 10-C was unconstitutional upon the points assigned in their notices of appeal. Following such decision Surrogate Foley made an order dated and entered in the Surrogate's Court September 28, 1937, modifying the said pro forma order and assessing the estate tax upon the estate of Alice G. Vanderbilt, deceased, inclusive of the aforesaid appointed property to the value of $5,285,572.07, (and exclusive of $650,000 of the aforesaid appointed property which was appointed to persons other than your individual petitioners) and overruled the aforesaid grounds of appeal. Said order, among other things,

"Ordered and Adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, in so far as the provisions thereof are hereby held to be applicable to the trust fund created by the Seventh Article of the will of said Cornelius Vanderbilt, deceased, over which the decedent Alice G. Vanderbilt exercised by Article Third of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt are valid and constitutional and do not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States or Article I, Section 6 of the Constitution of the State of New York; and [fol. 199] that the inclusion of the value of said trust fund to the extent herein directed in the gross estate of said Alice G. Vanderbilt, deceased, for the purposes of assessing, fixing and determining the estate tax upon the estate of said Alice G. Vanderbilt, deceased, does not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States or Article I, Section 6 of the Constitution of the State of New York, * * *."

4. Your petitioners duly took an appeal as of right from said order to the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, by their several notices of appeal from each and every part of said order of the Surrogate's Court (except such part thereof as sustained the appeals to the Surrogate and excluded $650,000 of said appointed property passing to others than your individual petitioners). Upon hearing said appeal the Appellate Division, upon its unanimous decision without written opinion, entered an order on October 28, 1938, affirming the order of the Surrogate appealed from. The Appellate Division remitted the proceeding to the Surrogate's Court of the County of New York, whereupon an order dated November 29, 1938, was entered in the said Surrogate's Court on November 30, 1938, making the said order of affirmance of the Appellate Division the order of said Surrogate's Court.

5. Thereafter, as provided by Section 588, subdivision 1 of the Civil Practice Act of the State of New York, your petitioners duly took an appeal as of right upon the constitutional questions, from said order of the Appellate Division, to the Court of Appeals of the State of New York, which is the highest court in the State of New York in which a decision in this cause could be had. Such appeal was instituted by your petitioners' several notices of appeal from each and every part of the order of affirmance of the Ap-
[fol. 200] pellate Division, and such appeal directly presented to the Court of Appeals the Federal questions herein sought to be reviewed by the Supreme Court of the United States, which questions are detailed in the assignment of errors presented herewith. Concurrently, pursuant to leave granted by the Appellate Division in an order entered December 16, 1938, and by separate notices of appeal, your petitioners appealed by leave of that court. The appeal as of right and the appeal by leave were argued in the Court of Appeals as one appeal, on February 27, 1939.

6. On July 11, 1939, the Court of Appeals handed down an opinion written by Judge Lehman, in which all other Judges taking part in the case concurred, in favor of the constitutional validity of the statute in question. This opinion is reported in 281 N. Y. 297. Said opinion shows that the Court of Appeals decided the Federal questions against

the contentions of your petitioners and in favor of the constitutional validity of the statute in question.

7. In pursuance of said decision of the Court of Appeals a final judgment of affirmance of the order of the Appellate Division was entered in the Court of Appeals on July 11, 1939. This final judgment duly remitted the record and judgment in the cause to the Surrogate's Court of the County of New York, there to be proceeded upon according to law. Such remittitur was thereafter duly filed in the said Surrogate's Court, whereupon an order was made by said Surrogate's Court on August 21, 1939, and entered on August 22, 1939, making the order of affirmance of the Court of Appeals the order of the Surrogate's Court of the County of New York.

8. By the said final judgment of the Court of Appeals of the State of New York, and the said order of the Surro- [fol. 201] gate's Court entered on August 22, 1939, the order of the Surrogate's Court of the County of New York dated and entered the 28th day of September, 1937, stands affirmed by the highest court of the State of New York in which a decision in the suit could be had, and the Surrogate's Court of the County of New York in the State of New York has possession of the record of the proceedings in the cause.

9. In accordance with Section 237 (a) of the Judicial Code of the United States, as amended [28 U.S.C.A. § 344 (a)] and Section 1 of the Act of Congress of January 31, 1928 [c. 14, 45 Stat. 54] as amended by the Act of April 26, 1928 [c. 440, 45 Stat. 466] and in accordance with the Revised Rules of the Supreme Court of the United States, your petitioners respectfully show that the cause is one in which a review can be had in the Supreme Court of the United States, as a matter of right, in that a final judgment has been rendered in the highest court of the State of New York in which a decision in the suit could be had, the validity of a statute of the State of New York was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

10. The errors upon which your petitioners are entitled to an appeal are more fully set forth in the assignment of

errors presented herewith pursuant to the Revised Rules of the Supreme Court of the United States; and there is likewise presented herewith, pursuant to said Rules, a statement as to the jurisdiction of the Supreme Court of the United States in this cause.

Wherefore, your petitioners pray for the allowance of an appeal in the above entitled cause from the said judgment of the Court of Appeals of the State of New York to the Supreme Court of the United States, in order that the [fol. 202] said judgment may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this cause duly authenticated by the Clerk of the Surrogate's Court of the County of New York in the State of New York, under his hand and the seal of said court, may be sent to the Supreme Court of the United States as provided by law, that an order be made touching the security to be required of your petitioners, and that the bond tendered by your petitioners be approved.

Dated, October 10, 1939.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Appellants, petitioners, by Roy C. Gasser, their counsel; Office and Post Office Address: 20 Pine Street, New York, N. Y. Gladys Szechenyi, Appellant, Petitioner, by Arthur A. Ballantine, her counsel; Office and Post Office Address: 31 Nassau Street, New York, N. Y. Cathleen Vanderbilt Lowman, Appellant, Petitioner, by Horace R. Lamb, her counsel; Office and Post Office Address 15 Broad Street, New York, N. Y. Gloria Laura Morgan Vanderbilt, [fol. 203] infant, Appellant, Petitioner, by Thomas B. Gilchrist, as General Guardian of her property, by Thomas B. Gilchrist, her counsel. Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant, Petitioner, Thomas B. Gilchrist, his counsel; Office and Post Office Address: 14 Wall Street, New York, N. Y.

[fol. 204] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 13, 1939

Now comes Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as general guardian of the property of said infant, appellants herein, and in connection with their petition for appeal to the Supreme Court of the United States, make and file this assignment of errors herein, to wit, that the Court of Appeals of the State of New York erred:

1. In affirming the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department.

[fol. 205] 2. In failing to hold that the statute of the State of New York, to wit, Article 10-C of Chapter 60 of the Consolidated Laws of New York, under which the tax involved in this suit was assessed, and particularly subdivision 7-a of Section 249-r thereof, is void as in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute imposes an estate tax upon the estate of Alice G. Vanderbilt, deceased, which is measured by including the value of property which said deceased did not own at the time of her death and had never owned, and in which said deceased had never had, either at the time of her death or at any other time, any beneficial or proprietary rights or interest whatsoever, the sole connection of said deceased with such property having been that she had and exercised a special or limited and wholly non-beneficial power of testamentary appointment over such property; and thereby deprives the appellants of property without due process of law.

3. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the afore-

said statute imposes an estate tax upon the estate of Alice G. Vanderbilt, deceased, which is measured by progressive rates applied to the aggregate of the value of the property owned by the deceased together with the value of property appointed by said deceased, pursuant to a special or limited and wholly non-beneficial power of appointment, such appointed property being property which the said deceased had never owned and in which the said deceased at no time had had any beneficial or proprietary rights or interest whatsoever; and thereby deprives the appellants of property without due process of law.

[fol. 206] 4. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute imposes an estate tax upon the estate of Alice G. Vanderbilt, deceased, which is larger than the tax imposed on the estate of a decedent in all respects identical with the estate of said deceased, except for a difference having no just or reasonable relation to the objects of an estate tax statute, such difference being merely the absence of, or the failure to exercise, a special or limited and non-beneficial power of appointment over the property of another person; and thereby discriminates against the appellants and denies to the appellants the equal protection of the laws.

5. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute makes the imposition of the estate tax imposed by such statute depend upon the question whether the appointed property involved was or was not subject to a death tax in the estate of the grantor of the power of appointment, irrespective of the kind or amount of such death tax in the grantor's estate, and such attempted classification between those subject to the tax and those not subject to the tax is arbitrary and capricious; and thereby discriminates against the appellants and denies to the appellants the equal protection of the law.

6. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute requires the amount of the estate tax assessed

upon the estate of Alice G. Vanderbilt, deceased, to be [fol. 207] measured by including the value of property appointed by said deceased in her will pursuant to a special or limited power created and conferred by the will of Cornelius Vanderbilt taking effect in 1899, whereas neither the aforesaid statute nor any statute of New York applies in like wise with respect to special or limited powers created and conferred by wills taking effect after September 1, 1930, the aforesaid statute providing in effect that it applies with respect to special or limited powers created and conferred by wills taking effect prior to September 1, 1930, but not to such powers created and conferred by wills taking effect after September 1, 1930; and thereby discriminates against the appellants and denies to the appellants the equal protection of the laws.

7. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute requires the amount of the estate tax assessed upon the estate of Alice G. Vanderbilt, deceased, to be measured by progressive rates applied to the aggregate of the value of the property owned by the deceased together with the value of the property appointed by said deceased pursuant to a special or limited power of appointment created and conferred by the will of Cornelius Vanderbilt taking effect in 1899, whereas neither the aforesaid statute nor any statute of New York applies in like wise with respect to special or limited powers which were created and conferred by wills taking effect after September 1, 1930, the aforesaid statute providing in effect that the value of property appointed by a decedent pursuant to a special or limited power of appointment created and conferred by a will taking effect prior to September 1, 1930 shall be aggregated with the value of the decedent's own property [fol. 208] for the purpose of computing the estate tax imposed by such statute, but shall not be so aggregated where the special or limited power of appointment was created or conferred by a will taking effect after September 1, 1930; and thereby discriminates against the appellants and denies to the appellants the equal protection of the laws.

For which errors the appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and

said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist general guardian of the property of said infant, pr. that the final judgment of the Court of Appeals of the State of New York be reversed and a judgment rendered in favor of the said appellants, and for costs.

Dated, October 10, 1939.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Appellants, petitioners, by Roy C. Gasser, their counsel, Office and Post Office Address, 20 Pine Street, New York, N. Y. Gladys Szechenyi, Appellant, Petitioner, by Arthur A. Ballantine, her counsel, Office and Post Office Address, 31 Nassau Street, New York, N. Y. [fol. 209] Cathleen Vanderbilt Lowman, Appellant, Petitioner, by Horace R. Lamb, her counsel, Office and Post Office Address, 15 Broad Street, New York, N. Y. Gloria Laura Morgan Vanderbilt, infant, Appellant, Petitioner, by Thomas B. Gilchrist, as General Guardian of her property, by Thomas B. Gilchrist, her counsel. Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant, Petitioner, Thomas B. Gilchrist, his counsel, Office and Post Office Address, 14 Wall Street, New York, N. Y.

[fols. 210-273] [File endorsement omitted.]

[fol. 274] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record—Filed October 13, 1939

To the Clerk of the Surrogate's Court of the County of New York, State of New York:

Please incorporate the following portions of the record in the transcript on the appeal to the Supreme Court of the United States heretofore prayed by Gertrude Vanderbilt

Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as General Guardian of her property, from the final order in the above-entitled suit:

[fol. 275] 1. The entire record in the Court of Appeals.

2. The remittitur of the Court of Appeals dated July 11, 1939.

3. The opinion of the Court of Appeals dated July 11, 1939.

4. The order of the Surrogate's Court of the County of New York, dated August 21, 1939 and entered August 22, 1939, making the order of the Court of Appeals its order.

5. The petition for allowance of appeal.

6. The assignment of errors and prayer for reversal.

7. The order allowing appeal.

8. The bond for costs on appeal.

9. The jurisdictional statement filed under Rule 12 of the Revised Rules of the Supreme Court of the United States.

10. The proof of service of the petition for appeal, assignment of errors and prayer for reversal, jurisdictional statement, and order allowing appeal, together with statement calling appellee's attention to paragraph 3 of Rule 12 of said Revised Rules.

11. Citation on appeal, with proof of service.

12. This præcipe with proof of service.

Dated, October 11, 1939.

Roy C. Gasser, Counsel for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased and said Cornelius Vanderbilt, individually. Arthur A. Ballantine, Counsel for Appellant, Gladys Szechenyi. Horace R. [fol. 276] Lamb, Counsel for Appellant, Cathleen Vanderbilt Lowman. Thomas B. Gilchrist, Counsel for Appellant, Gloria Laura Morgan Vanderbilt, infant. Thomas B. Gilchrist, As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant.

[fols. 277-279] [File endorsement omitted.]

[fol. 280] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed December 2, 1939

To the Clerk of the Supreme Court of the United States:

Come Now the appellants, pursuant to Paragraph 9 of Rule 13 of the Revised Rules of this Court, and adopt their assignment of errors as their statement of points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of said points, except the following portions thereof which should be omitted in printing:

1. Statement under Rule 234 (pages 1-2, folios 1-4).
2. Pages 73-116, inclusive, of the transcript.
3. Pages 156-158, inclusive, of the transcript.

[fol. 281] 4. Pages 171-172, inclusive, of the transcript.

5. Proof of service of order allowing appeal, petition for appeal, assignment of errors and prayer for reversal (pages 210-211).

6. Proof of service of jurisdictional statement (pages 259-260).

7. Proof of service of statement under Rule 12(2) (pages 263-264).

8. Bond on appeal (pages 265-266).

9. Citations on appeal, with proofs of service (pages 267-273).

10. Proof of service of praecipe (pages 277-278).

11. Proof of service of motion to dismiss or affirm (pages 286-287).

12. Clerk's certificate.

Dated, November 21, 1939.

Roy C. Gasser, Counsel for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually. Arthur A. Ballantine, Counsel for Appellant, Gladys Szechenyi. Horace R. Lamb, Counsel for Appellant, Cathleen Vanderbilt Lowman. Thomas B. Gilchrist, Counsel for Appellant, Gloria Laura Morgan Vanderbilt, infant. Thomas B. Gilchrist, As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant.

[fol. 282] [File endorsement omitted.]

Endorsed on cover: File No. 43,948. New York, Surrogate's Court, County of New York. Term No. 541. Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, et al., appellants, vs. State Tax Commission of the State of New York. Filed November 18, 1939. Term No. 541, O. T., 1939.